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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 807

MISSISSIPPI VALLEY BARGE LINE COMPANY,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 13, 1934.

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[fol. 8]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

No 10496

Mississippi Valley Barge Line Company, a Corporation, Petitioner,

vs.

The United States of America and The Interstate Commerce Commission, Defendants

Amended Petition—Filed Aug. 15, 1933

To the Honorable the Judges of said District Court:

Your petitioner by leave of court presents and files this amended petition, and your petitioner, the Mississippi Valley Barge Line Company, hereinafter called "Barge Company", brings this action against the United States of America and the Interstate Commerce Commission, hereinafter called "Commission" for the purpose of enjoining, setting aside, annulling and suspending a certain order of the Commission relating to transportation, made and entered on the 3rd day of July, 1933, and by amended order entered on the 18th day of July, 1933, in proceedings as follows:

By Supplement No. 54 to Agent Emerson's Tariff No. 1-H, I. C. C. No. 156, and Sup. 48, 10-B, I. C. C. 165, become effective October 1, 1932, the carriers party thereto proposed reduction in the rates on sugar in carload from gulf ports, to-wit, Mobile, Alabama, New Orleans, Louisiana, Pensacola, Florida, and Port Chalmette, Louisiana, to certain destinations in Illinois, Indiana, Iowa, Kentucky, Missouri, Ohio, Tennessee and Wisconsin. The participating carriers in said tariffs are set forth in Exhibit A hereto attached, and one, or more of said corporations is organized under the laws of the State of Missouri and has its principal office in this judicial district. Thereafter various par- [fol. 9] ties and your petitioner on, to-wit, September 8, 1932, applied by petition to the Interstate Commerce Commission and protested said rates and requested suspension; that thereafter the Commission upon said petition suspended said rates and entered its order of investigation and suspension, its Docket No. 3814, designated "Sugar Rates from Gulf Ports", and said Commission thereafter entered upon an investigation and on July 3, 1933, rendered a decision which was released from the office of the Commission, and received by petitioner on July 17, 1933, and final orders of the Commission in connection with said decision were entered as of July 3, 1933, as amended July 18, 1933. The decision of the Commission is hereto attached and marked Exhibit B and contains order of July 3rd, 1933. The final order of the Commission is hereto attached, marked Exhibit C, and by reference said Exhibits A, B and C are made a part of this petition.

1. For its cause of action petitioner states that Barge Company is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of law, owning, maintaining and operating a line of towboats and barges on the Mississippi and Ohio Rivers serving ports New Orleans, Louisiana, Cincinnati, Ohio, St. Louis, Missouri, and ports intermediate thereto in the transportation by Barge Company of freight as a common carrier in interstate and foreign commerce—the principal operating office of Barge Company is now and it was at all such times situated in the City of St. Louis in the Eastern Division of said Eastern Judicial District of Missouri.

Your petitioner states that its venture was undertaken by reason of the assurance that water transportation would be preserved in full vigor under the mandate of Federal enactments.

2. The United States of America is made defendant in this suit pursuant to District Court Jurisdictional Act, Sections 45-a and 46, 38 Statute 219 and 36 Statute 1149, [fol. 10] respectively, (Title 28, Chapter 2, Section 45-a, and Section 46, U. S . C. A.).

3. The Commission is an administrative tribunal created by the Act to Regulate Commerce (24 Statute at Large

379) approved February 4, 1887, as amended (The Interstate Commerce Act) and is specifically charged with the administration and enforcement of said Act, including the various provisions thereof, including the Transportation Act of 1920 and Section 500 thereof.

4. In said proceeding, I. & S. 3814 and associated cases and on, to-wit, July 3, 1933, and on July 18, 1933, said Commission made and entered an order and an amended order on said dates, and in said order the Commission referred to and made a part thereof a "Report" of the Commission "containing its findings of facts and conclusions thereon." In and by said report the Commission found that the purpose of the rail lines in the proposing of the rates contained in the tariff aforesaid was a drastic and sweeping reduction in rates for the evident intention and purpose of meeting a competitive rate by barge-truck competition and that said rail carriers would consider even lower rates than those proposed if said rates "do not prove sufficiently effective" for the purpose of regaining sugar traffic from the water lines and in said decision said Commission in exact terms admitted that the rates proposed, and by the Commission found justified, would result in a staggering blow to the water barge lines, and further specifically stated (Sheet 17) that accordingly the usual water-truck rates to interior points north and south of the Ohio River are probably from 5 to 15 cents higher than the proposed all rail rates of 28 and 30 cents—the proposed rates as applied to the interior points alone would prob- [fol. 11] ably bring respondents (rail carriers) a heavy traffic, would stop a large part of the distribution of waterborne sugar, and dry up much of the water movement. (Sheet 19) "If the differential is substantially reduced the standard barge lines will get less sugar and lower rates on such of it as they do handle. Barge rates made on the 80% basis if applied to the tonnage moved by the Federal Barge Line in 1931 would have cost that carrier about $350,000.00 and wiped out its showing of net revenue. If applied to the reduced volume that it would probably have received under a differential of about 5 cents, they would have cost it much more. * * * If respondents succeed, the barge lines will be dealt a staggering blow."

5. Your petitioner respectfully states to the Court that the above statements and findings of the Commission sub-

stantially carried into effect the proposal of the railroad. The Commission recognized that the proposed rates of the rail carriers as contained in the tariffs above mentioned, which are here allowed to become effective with slight modification under said decision and order of the Commission, will result in taking from the water carrier its entire sugar tonnage which your petitioner states in years past constituted 33⅓% of its total tonnage moving over and along its lines, and approximately 40% of its total revenue. The Commission in said decision recognized the facts and found that the rates proposed by the rail carrier and justified by the decision of the Commission will be a staggering blow to water carriers, including this petitioner, and that said rates will result in the elimination of the entire net revenue of the Federal Barge Line, a federal agency which operated under and by virtue of a mandate of Congress for the purpose of demonstrating the feasibility of water transporta- [fol. 12] tion, and your petitioner states that said Federal Barge Line as a federal agency operates under circumstances and conditions and at a less total cost of operation than your petitioner, a private enterprise, and that, therefore, the finding with reference to the situation of the Federal Barge Line, with reference to its inability to continue in water transportation as a profitable venture, applies in an exaggerated form as against your petitioner.

6. And further that said Commission in said particular finding specifically states that the rates proposed by the carriers and found by the Commission to be justified with slight modification to interior points north and south of the Ohio River on sugar, and in the movement of which your petitioner is vitally interested, are probably from 5 to 15 cents higher than the proposed all-rail rates, which in plain language means that the rates proposed by the carriers for all rail service by rail lines are from 5 to 15 cents lower than the total cost of the barge-truck movement. The Commission in said decision justified the proposed rates of the rail carriers for carload application on a minimum weight of 60,000 pounds and modified the proposed rates of the rail carriers for carload application on minimum weights of 80,000 pounds by increasing the proposed rates 4 cents per 100 pounds.

7. The findings of the Commission have dwelt entirely on the 80,000 pound rates, and their having found justified the

80,000 pound minimum rates less than the 60,000 pound minimum rates constitutes the sole justification for their findings with respect to the 60,000 minimum rates. Your petitioner states the fact to be, and the decision of the Commission recognizes the fact that by far the major portion of the sugar tonnage will move on the 80,000 pound minimum, and the Commission in its said decision justifies a rail rate 4 cents over the rates proposed by the rail carriers, and, therefore, approves of a rate for all-rail service from [fol. 13] 1 to 11 cents lower than the total cost to the refiner of a barge-truck movement, to-wit, a movement by barge from gulf port to a Mississippi or Ohio River port plus the cost of a truck delivery from said river port to the interior destination.

8. Your petitioner further states that under the Interstate Commerce Act and the Denison Act it is recognized that for the barge-rail movement of tonnage it is necessary that a differential be prescribed under the all-rail rate in order to attract tonnage to the barge line as a participating carrier and that the Commission in prior decisions, to-wit, Ex Parte 96, 99 and 102, has by definite and positive order prescribed differentials under the all-rail rate of amounts in cents per 100 pounds to be determined by taking 20% of the all-rail rate applicable between the two ports served by the barge line in a given joint movement, and, therefore, to the extent that the Commission in its decision has found justified rail rates lower than barge-truck cost to interior points, it has not given effect or consideration to the full damage and detriment that would accrue to the barge line movement on this or any other tonnage, and to that extent has not indicated the full detriment and the damage that will accrue to the barge line by the rail rates here found justified.

As further evidence of the intent and purpose of rail carriers designated in Exhibit A, your petitioner states that since they entered upon the policy to eliminate water transportation the Southern carriers have reduced rates on Bagging, Canned Goods, Coffee, Corn, Cotton, Glassware, Paper pulp, Rice, Soap, Sugar, Sulphur and Tobacco, to-wit, on every commodity handled by your petitioner in excess of one thousand tons a year.

[fol. 14] 9. Your petitioner further states that by virtue of 41 Statute 499, Section 500, approved February 28, 1920

(U. S. C. A. Title 49, Section 142), it is declared by Congressional mandate as follows:

> "It is declared to be the policy of Congress to promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States and to foster and preserve in full vigor both rail and water transportation."

And your petitioner, therefore, states that the Commission in its decision has entirely failed and refused to give effect to this mandate of Congress, a positive and direct statement as to the Commission's duties and responsibilities, and your petitioner further states that in the particulars above set forth the decision of the Commission for all practical purposes admits and recognizes that the effect of the rates justified and therein specifically set forth will deny to water transportation its continuation as a profitable operation, and contravenes the mandate that water transportation be fostered and preserved in full vigor.

10. Your petitioner further represents and states that said decision and order of said Commission is without evidence to support same and beyond the record in said proceeding since the Commission therein, in considering the level of the proposed rates, has taken the testimony of neither the respondents nor protestants, and although the Commission in its decision does not indicate the particular manner in which it arrives at a formula to justify the level of the rates approved or designated, the only way in which said conclusion could have been reached is by taking a mathematical average of the costs testified to by respondents' and protestants' witnesses, averaging the two, and adding a differential testified to by one sugar refiner who [fol. 15] indicates the particular differential upon which he would move sugar by barge line. The Commission thus erroneously and unlawfully arrived at a total cost of the barge service. The Commission in determining the level of the rail rates, considered the cost of competitive transportation; since the Commission erred as indicated above, in its computation of barge service cost, the result reached by it as to the rail rate level is necessarily erroneous and unlawful. There is no testimony in the record to justify the Commission's finding.

Further, your petitioner represents and states that the Commission in the instant proceeding in giving consideration to the level of the rail rates (which it justifies and designates) in order to determine whether or not said rates are compensatory for the service performed by the rail lines, has alone taken into consideration the fact that the 80,000 pound minimum rates found justified will for the service over the short line from New Orleans to Chicago produce net ton per mile earnings of 6½ mills as contrasted with the system cost of the Illinois Central of 6 mills per ton per mile, and that the Commission in making this comparison has given consideration to the system costs of one of the rail lines only, whose costs are extremely low by reason of the fact that 50% of its tonnage consists of products of mines, which is the cheapest of all kinds of freight to transport; that it bases the earnings out of the rates found justified on the short line distance and gives no consideration to the other much longer available routes by which this rate will apply, and by this erroneous calculation finds compensatory the rates justified and designated.

[fol. 16] 11. Your petitioner alleges and states that the rail carriers presenting the tariffs heretofore mentioned proposed a 28 cent rate from New Orleans to St. Louis alone for the alleged and indicated purpose of meeting a competitive situation incident to water transportation. Your petitioner further states that at the time of the filing of said tariffs, and at the present time, the going rate incident to port to port movement from New Orleans to St. Louis by certificated barge line was from 37¢ to 42¢ per hundred pounds, and that said lines then and now move a large proportion of the north bound barge sugar; and your petitioner further states that the going rate at the time the tariffs above mentioned were presented of the all-rail movement from New Orleans to St. Louis was 52¢ per hundred pounds. Your petitioner further states that the Commission in connection with the 28¢ rate proposed by the rail carriers on 80,000 pounds minimum approved and designated a rate four cents higher as justified for all-rail-movements from New Orleans to St. Louis, which produces a rate justified by the decision and order of the Commission of 32¢ for all-rail movement from New Orleans to St. Louis; that this particular approved and designated rate for all-rail application is, therefore, below the present certificated barge line rate. And your petitioner further alleges and states that the evident intent and purpose of said rail carriers, in so far as certificated barge line competition is concerned, by virtue of the level of the rates proposed, indicated more than the meeting of a competitive rate by this competitive transportation facility, and was intended to cripple or eliminate certificated barge lines operating over and along the Mississippi and Ohio Rivers and their tributaries.

Your petitioner further states that at the time of this hearing there was no through barge route from New Orleans to Chicago, and that, therefore, the rate to St. Louis [fol. 17] is typical of the character of the rates proposed by the rail carriers, and the particular intent and purpose that the rail carriers had in mind in proposing said rates. Your petitioner further states that the Commission in the approval and designation of a rate of 32 cents for all-rail movement from New Orleans to St. Louis to meet a competitive certificated barge line rate of 37 cents to 42 cents permitted and allowed the rail carriers to carry out and put into execution and effect their purpose, to-wit, the elimination of certificated barge line movements.

Your petitioner further represents and states that the contract barge operators at the time of the hearing before the Interstate Commerce Commission moved substantially less volume of sugar than other carriers, and that in so far as the Interstate Commerce Commission has given consideration to the so-called contract barge movements from New Orleans to ports upon the Mississippi and Ohio Rivers in an attempt to determine a level for the all-rail movements, that the contract barge line operators and operations have disappeared from the picture since the hearing before the Commission, with the exception of one particular line, which since the hearing before the Commission has increased its rate for tow service from New Orleans to St. Louis to 25 cents, and that all other contract barge operators and operations over and along the Mississippi and Ohio Rivers or their tributaries have disappeared from the picture at the present time, and therefore, the proposed [fol. 18] rates approved or the rates designated by the Commission as justified at the time said rates will become effective will be to meet alone the competitive situation as presented by the certificated barge lines, including your petitioner, and that the prescription and publication of a 32 cent rate for all-rail movements from New Orleans to St. Louis as designated and justified by the Commission to meet a competitive situation of the certificated barge lines of 37 to 42 cents from New Orleans to St. Louis produces a situation where the all-rail lines are permitted to charge less per hundred pounds than the rate of the certificated barge lines, and that the effect of such rates being justified and if permitted to become effective can have but one result, and that is the elimination of the entire sugar tonnage from the water-borne service. The Commission has and now recognizes the fact that for the inferior service of the water line a differential under the all-rail rate is necessary to move tonnage by barge. This aggravates the situation above indicated and the Commission by its order is permitting and allowing a positive effort on the part of the rail lines to eliminate water competition.

12. Your petitioner further represents and states that by virtue of 26 Statute 209 (U. S. C. A., Title 15, Section 1) every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal. Section 2 of said enactment further makes it unlawful for any person or persons to monopolize any part of the trade or commerce among the several states or with a foreign nation, and provides a penalty for same.

[fol. 19] 13. Your petitioner further states that the rail carriers designated in Exhibit A hereto attached have by joint or concurrent action proposed particular tariffs applicable to rates by rail lines on sugar from various origins and to designated destination, and it is alleged that the purpose and intent of said rail carriers is in effect to restrain commerce between the various states, or tend thereto, and that the Commission in said decision recognizes the fact that these tariffs will have the effect to restrain commerce between the various states, or tend thereto. Your petitioner further represents and states that in the oral argument, I. & S. 3814 and associated cases, attorney for one of these carriers, and evidently concurred in by the other rail carriers, frankly and definitely expressed to the Commission that it was the intent and purpose of the proposed rates to cripple or entirely eliminate water transportation; and your petitioner further represents that of necessity this is the result of the confederated and concurrent action by the rail carriers in the instant proceeding, and that the Commission has failed and refused to give effect to this mandate of Congress and hereby permits of concurrent action by various rail carriers which results by reason of a contract, combination or agreement and will restrain the trade and commerce among the several states and will tend to produce a monopoly in reference thereto. Wherefore, your petitioner states that said decision of said Commission is in direct conflict with statutory enactment, and that, therefore said decision and order are contrary to law, illegal and void.

Your petitioner further represents and states that by virtue of a lawful enactment of Congress, 45 Statute 978, [fol. 20] as amended May 29, 1928 (U. S. C. A. Title 49, Section 152, et seq.) Congress provided for a corporation, and appropriated designated amount for the purpose of demonstrating the feasibility of water transportation and provided that it was the policy of Congress to continue said transportation service of the corporation until there were completed navigable channels adequate for reasonable, dependable and regular transportation service thereon, terminal facilities adequate for the joint rail and water service, joint rail and water rates, and private persons, companies, or corporations engaged or ready and willing to engage in common carrier service on such river, and that said project should be continued upon the Mississippi River and its tributaries until the feasibility of said venture should be determined, and said corporation should not be sold to any carrier by rail or person or company directly or indirectly connected with any carrier by rail or any person, company, or corporation who should not give satisfactory assurance and agree as a part of the consideration for said sale that the privilege so sold at least should be continued in the common carrier service in a manner substantially similar to that rendered under federal supervision by said corporation, and further provided that any person, firm or corporation, including the Inland Waterway Corporation, engaged or about to engage in conducting a common carrier service upon the Mississippi River or its tributaries, could apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of said enactment.

Your petitioner further states that in accordance with the provisions of said enactment it, as a corporation engaged or about to engage in common carrier service on the Missisipi River and its tributaries, did obtain a certificate of [fol. 21] public convenience and necessity in Ex Parte 99 (167 I. C. C. 41) and that by said decision and order of the Commission, said Interstate Commerce Commission directly found that your petitioner was an operation in public interest and of public convenience, and your petitioner further represents and states that by virtue of the order of this Commission in I. & S. 3814, that the effect upon your petitioner is to remove, or tend to remove, various movements of sugar from your petitioner's line and to render said venture unprofitable and that the effect of the order of the Commission in I. & S. 3814 and associated cases is to remove said transportation facility as a water carrier from the Mississippi River and its tributaries and to withdraw and annul for all practical purposes its certificates above referred to without said certificate being directly brought in issue or being at issue in the instant proceeding.

Your petitioner further represents and states that under the decision of the Commission in the instant case, I. & S. 3814 and associated cases, the Commission admits that it is improbable that the rail carriers by the rates proposed or designated can or will recapture sugar tonnage in sufficient amount to compensate them for the losses which they will sustain under the present movement and under the present rate, that the Interstate Commerce Act (U.S.C.A. Title 49) Section 15-a, places a positive duty upon this Commission to maintain the operation of rail lines as efficient and effective system of transportation, and as "will under honest, efficient, economical management and reasonable expenditures—earn an annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railroad property * * * used in the service of transportation"; that the rail lines here involved at the present time are in dire need and in financial distress, [fol. 22] that the rates here justified or designated will necessarily result in a substantial depreciation of carrier's revenue, and that, therefore, the instant decision is contrary to and in violation of expressed mandate of Congress with reference to matters within the jurisdiction of the Interstate Commerce Commission.

14. Your petitioner states that the Commission in connection with I. & S. 3814 heard upon a common record I. & S. 3829 and Fourth Section Application 14080, and that I. & S. 3829 involves rates on the same commodity proposed by Eastern carriers to the same destination territory, and that Fourth Section Application 14080 had to do with proposed rates by Western carriers from the Pacific Coast to the same or related destination territory, and your petitioner states that the Commission in giving consideration to said dockets, and upon the movement of the same commodity from the Gulf ports, from the Atlantic seaboard and from the Pacific Coast, decided and determined and issued effective orders in connection therewith as follows:

First: That the Eastern rail carriers on the movement of sugar from the Atlantic seaboard to Chicago and related destinations were justified in charging 27½% of the applicable first class rate on the movement of said commodity and from said origins and to said destinations. In I. & S. 3814 the Commission decided and determined that in the movement of sugar from New Orleans to St. Louis, Chicago and intermediate territory, that the Southern lines were justified in the prescription of rates in definite cents per 100 pounds, and that said carriers were justified in permitting and allowing said rates to intermediate territory to blanket back to a point where the level of the rates would not violate the Fourth Section of the Interstate Commerce Act, and that the Commission in Fourth Section Application 14080 from the Pacific Coast on Trans-Conti- [fol. 23] nental Lines permitted these lines to maintain and apply rates to the designated territory east of the Mississippi River on a lower level than the points west of the Mississippi River and intermediate thereto and granted these carriers Fourth Section relief in order that said rate would not violate the Fourth Section of the Interstate Commerce Act.

15. Your petitioner further represents and states that insofar as the Commission permitted the blanketing back of rates in order to meet the Fourth Section requirement of the Interstate Commerce Act, it has permitted and allowed the Chicago rate to intermediate points for a distance

of approximately 400 miles south of Chicago and St. Louis, while in the same proceeding the Commission required the Eastern shipper and seller and rail carrier to graduate the scale of rates, giving consideration to distance, and on the other hand, in connection with the rates from the Pacific Coast it has allowed Fourth Section relief, and by reason thereof shippers, refiners and purchasers at intermediate points contrasted with the other results in discrimination and undue preference and prejudice in violation of Section 2 and Section 3 of the Interstate Commerce Act. The Commission in its decision (Sheets 19-20) recognize-these violations of the Act and makes no defense for said situation.

16. Your petitioner further states that in I. & S. 3814, the Commission's attention was specifically directed to the resultant rates that would be applicable to the movement of sugar from the gulf port to river ports and interior destinations, and to the disparity between these rates and the rates from the Atlantic seaboard to interior points which is permitted and allowed under the decision of the Commission (in connection with the rates proposed and justified or designated by the Commission), and to the fact that [fol. 24] there will be for similar distances from the gulf port and Atlantic a difference in rate of approximately 13 cents. The Commission in said decision recognizes this situation and that it will create violations of the Interstate Commerce Act but justifies said decisions upon the theory that the rail carriers intend to relieve and remove this situation. Your petitioner further respectfully represents and states that the order of the Commission therefore results in violation of Sections 2 and 3 of the Interstate Commerce Act and, therefore, is contrary to law and therefore illegal and unlawful and void.

17. Your petitioner further represents and states that the Commission in the justification and designation of the rates in the instant proceeding has brought about a situation which will result in a violation of the Fourth Section of the Act, and as a typical illustration of this situation states that the rates fixed from New Orleans or Jonesboro, Arkansas, for 486 miles is 34 cents, this point being intermediate to St. Louis, at which point the rate has been fixed at 32 cents and St. Louis is a farther distant point from New Orleans. That this and other rates are contrary to

the Fourth Section of the Interstate Commerce Act, and therefore contrary to law and therefore unlawful and void.

18. Your petitioner further represents and states that by reason of the matters and things above set forth the order of the Commission will result in a level of rates which will divert the movement of sugar tonnage from its line and operation to other forms of transportation, that it will necessarily result in the crippling or entire elimination of your petitioner's business.

That the Commission by virtue of its orders, Exhibits B [fol. 25] and C hereto attached, has designated and provided that the rail carriers presenting the tariffs above set forth shall be permitted and allowed, effective as of July 29, 1933, to base their rates on a minimum of 60,000 pounds in accordance with the proposal of the rail carriers and as justified by the Commission in said decision upon not less than five days' notice of the filing and posting of said rates in the manner prescribed in Section 6 of the Interstate Commerce Act; and by said order the Commission authorized the rail carriers proposing the rates and the tariffs above set forth to base their rates on a minimum of 80,000 pounds in accordance with certain rate levels designated in said order on or before September 5, 1933, but not prior to July 29, 1933, upon notice to the Commission and to the general public by not less than five days filing and posting in the manner prescribed by Section 6 of the Interstate Commerce Act to have said rates become effective. Your petitioner further represents and states that the carriers presenting the tariff involved in I. & S. 3814 have heretofore presented the rates here found justified and designated by the Commission on the 60,000 pound and 80,000 pound minimum in accordance with the provisions of law, and your petitioner further represents and states that since said rates have been permitted and allowed to go into effect by virtue of the invalid and unlawful orders as above set forth they have and will result in irreparable injury and damage to your petitioner, and that the allowance of said rates to become effective upon the dates cited or at any subsequent date will result in damage and irreparable injury to your petitioner.

[fol. 26] Your petitioner further states that the rates justified and permitted in the Commission's order produce the following result: The barge lines, in order to attract and move sugar over their lines, will be required to publish rates under the all-rail rate, to-wit, differentials. This will cause the barge line to accept for movement of sugar over its lines less than actual or out of pocket cost for said service. Operation by privately owned barge lines, therefore, cannot continue, and operation of the Federal Barge Line will not be permitted to demonstrate the feasibility of water transportation. The effect is to take and indirectly confiscate the property of your petitioner by virtue of a decision and order of the Commission charged with the duty to preserve water transportation in full vigor.

19. Your petitioner further states that in connection with the above designated docket, I. & S. 3814, and associated cases, your petitioner filed a motion for rehearing and/or reargument and/or modification, and that in said motion your petitioner called the attention of the Interstate Commerce Commission specifically to changed conditions which had resulted subsequent to the hearing bebefore the Commission, and requested the Commission by reason thereof to grant your petitioner a rehearing in said cause.

a. Your petitioner further states that the changed conditions alleged in said motion related to the depression and the change in business activities, and suggested that the National Industrial Recovery Act would result in a remedy and cure many of the conditions pertaining to competition and competitive rates by reason of the codes to be adopted by various transportation agencies, including barge lines.

[fol. 27] b. That Honorable Joseph B. Eastman had been appointed as Coordinator of Transportation under said enactment to plan exact regulation and coordination of all forms of transportation, and that various committees were now functioning for the purpose of securing regulation and coordination of said forms of transportation; and that said coordination of various forms of transportation made unnecessary the drastic cut in rail rates proposed by respondent carriers in said proceeding, which would result in a loss to the rail carriers of the United States in the approximate sum of $10,000,000 per year; that water transportation had attempted to draw codes under and by virtue of which rates for water transportation would be placed upon a definite basis and upon a reasonable level, and that conditions have entirely changed in the respects above indicated since the hearing of the evidence and the making of the record in said cause before the Commission.

c. That the particular competition which was presented by respondents in connection with the competitive rates that rail lines had to meet had entirely changed and that the record before the Commission was stale; that the competition of the contract barge lines had entirely disappeared, with the exception of one particular line, which had recently increased its rates, and which made infrequent trips, and whose service was not upon regulated schedules; and that, therefore, the particular cost testified to before the Commission with reference to water-borne tonnage, and to the shipper, when said record was made, and the cost at the present time, were entirely different; that the only transportation agencies which were now moving substantial tonnage of sugar from the Gulf ports to [fol. 28] St. Louis, Missouri, and related destinations were the certificated barge lines, including your petitioner, and that the rates charged by them on port to port movements from New Orleans to St. Louis are 37 and 42 cents, and that, therefore, there was no reason to reduce the rail rates to the level designated by the Commission in order to meet any competitive transportation service; that in said motion for rehearing, your petitioner specifically set forth that the particular rates found justified or designated by the Commission were far below the rates for the movement of sugar by water transportation from the Gulf to Ohio and Mississippi River ports, and that under the rates proposed or designated water transportation could not continue as a profitable venture.

Your petitioner further states that said motion was duly forwarded to the Interstate Commerce Commission, and on, to-wit, July 25, 1933; and your petitioner further states that said motion for rehearing was overruled by the Interstate Commerce Commission on the date of August 3, 1933; and your petitioner further represents and states that said petition for rehearing was in the nature of a supplemental bill, presented a new and radically different situation which had supervened since the record before the Commission was made, and that by reason of said changed condition it was mandatory upon the Commission to grant petitioner's motion in order that a fair hearing could be obtained; that said petition was suitably presented in accordance with the rules of the Commission, and that the denial by said Commission of said petition for rehearing was a denial of a right guaranteed by law.

Wherefore, your petitioner states that said action on [fol. 29] the part of the Interstate Commerce Commission was unlawful, and that said order of said Commission is invalid.

Your petitioner hereto attaches and by reference makes a part of this petition said motion for rehearing in its entirety, and specifically calls the court's attention to that portion of said motion beginning with page 2 and ending on page 18, as indicated in said printed document.

Your petitioner further represents and states that when it was advised of the decision of the Commission and the orders relating thereto, and by virtue of said orders the Interstate Commerce Commission authorized and empowered said rail carriers to put said rates into effect on July 29th and 31st, respectively, it advised said Commission that it was the intent and purpose of your petitioner in said proceeding to file a suit to enjoin the order of said Commission, and further advised said Commission that the District Judges of the United States District Court at St. Louis, Missouri, were away from the City and it was, therefore, impossible to secure an interlocutory stay or order before the effective dates of said rates, and requested the Commission to change the effective date of said rates so that your petitioner could secure and arrange for an expedited hearing by a three-judge court and thus hold said rates in abeyance until a decision had been rendered by said three-judge court.

Your petitioner further represents and states that on the same date, to-wit, July 26, 1933, the Interstate Commerce Commission, through its Chairman, advised that the Commission could not consistently comply with the above request, and that said Commission by its action permitted and allowed said rates to become effective.

[fol. 30] Your petitioner further represents and states that it has used due diligence in an effort to prevent said rates becoming effective, and your petitioner states that the rates which are now in effect are in effect solely by reason of the failure of the Commission to extend the effective date of said rates.

20. Your petitioner further represents and states that by reason of the foregoing, such order of the Commission is erroneous, unlawful and invalid, in that it is inconsistent within itself, that it is legally arbitrary, is without substantial evidence to support it, it is discriminatory as above set forth in violation of Section 2 of the Interstate Commerce Act, is unduly preferential to certain particular origins in violation of Section 3 of the Interstate Commerce Act, is contrary to Section 4 of the Interstate Commerce Act, that it is unlawful and void by reason that it violates the mandate of Congress, Section 500 of the Transportation Act, and is unlawful and void in that it violates the Anti-Trust Law and Section 1 of the Sherman Act and in the particulars above specifically set forth. That it confiscates petitioner's property.

Your petitioner further represents and states that the matters and things here involved and the suit here instituted was brought to suspend and set aside in whole or in part an order of the Interstate Commerce Commission and that the same is brought in the Judicial District wherein is the residence, domicile or principal place of business of a party or one of the parties upon whose petition the order was made and in the district where the matter complained of in the petition before the Commission arises, and that your petitioner has its principal operating office within this district.

[fol. 31] Wherefore, your petitioner therefore prays that a subpœna or subpœna in chancery issue out of and under the seal of this Honorable Court directed to the defendants as required by law and that due and proper service of such process and of this amended petition be forthwith made by filing a copy thereof in the office of the Secretary of the Interstate Commerce Commission, and another copy in the Department of Justice as in said District Court Jurisdiction Act is provided, and that thereby the defendants and each of them be required on or before a date to be specified in such subpœna or notice to appear herein and answer this amended petition, but not under oath, answer under oath being hereby expressly waived.

That a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending until the further order of the court the effect and enforcement of said order of the Commission.

That pending a hearing upon the aforesaid application for a temporary or interlocutory injunction a preliminary restraining order be issued in terms restraining, enjoining and suspending the enforcement of said order of the Commission until said application for a temporary or interlocutory injunction shall have been heard and determined.

That after final hearing this Court shall adjudge, order and decree that said order of the Commission is and has at all times been wholly void, and that said order be perpetually set aside, suspended and annulled and the enforcement thereof perpetually enjoined.

[fols. 32 & 33] That your petitioner shall have such other and further relief in the premises as equity and justice may appertain and as may be deemed by this Honorable Court to be adequate and proper under the circumstances.

Mississippi Valley Barge Line Company, by L. W. Childress, President; by Thompson, Mitchell, Thompson & Young; by (Sig.) J. R. Van Slyke, J. R. Van Slyke, Attorneys for Petitioners.

Duly sworn to by M. W. Howe. Jurat omitted in printing.

[fol. 34] Exhibit "B" To Amend Petition

Interstate Commerce Commission

Investigation and Suspension Docket No. 38141

Sugar From Gulf and South Atlantic Points

Sugar Cases of 1933

Submitted March 2, 1933 Decided July 3, 1933

1. Proposed reduced rates on sugar, in carloads, from eastern cities on and near the Atlantic seaboard to points in central territory found justified. Order of suspension vacated and proceeding discontinued.

2. Proposed reduced rates on sugar, in carloads, minimum 80,000 pounds, from southern refining points to Chicago, Ill., St. Louis, Mo., and other destinations in the so-called Illinois district and in intermediate territory found not justified. Suspended schedules ordered canceled without prejudice to the filing of new ones providing rates 4 cents higher. Proposed reduced rates on like traffic, minimum 60,000 pounds, found justified and order of suspension vacated. Proceeding discontinued.

3. Proposed reduced rates on sugar, in carloads, from Louisiana refining points to points in the northern half of Arkansas, the southeastern part of Missouri, and the extreme eastern part of Oklahoma found not justified. Suspended schedules ordered canceled without prejudice to the filing of new ones on basis of 20 per cent of first class. Proceeding discontinued.

4. Upon reargument, transcontinental carriers granted fourth-section authority, subject to conditions, to establish lower rates on sugar, in carloads, from San Francisco Bay points to Chicago, Ill., St. Louis, Mo., and related points than to intermediate points. Previous report, 186 I. C. C. 523.

5. Western carriers granted fourth-section authority, subject to conditions, to establish lower rates on sugar, in carloads, from Western beet-sugar manufacturing points to Chicago, St. Louis, and related points than to intermediate points.

This report also embraces Investigation and Suspension Docket No. 3829, Sugar from Eastern Points to Central Territory; Investigation and Suspension Docket No. 3837, Sugar from New Orleans to Arkansas, Missouri, and Oklahoma; Fourth-Section Application No. 14080, on reargument; and Fourth-Section Application No. 14816.

Elmer A. Smith, W. N. McGehee, Frank W. Gwathmey, Charles D. Drayton, Wm. C. Burger, E. L. Beach, E. H. Burgess, Walter McFarland, J. M. Souby, J. E. Lyons, G. H. Muckley, John Q. Dier, L. E. Kipp, J. G. Kerr, J. E. Dimond, C. H. Pistor, H. B. Muller, H. V. Cook, F. A. Key, G. A. Hoffelder, J. E. Davis, S. P. Kelly, R. I. Miles, A. L. Burford, M. G. Roberts, Robert Thompson, W. E. Davis,

H. H. Larimore, Geo. W. Holmes, and C. M. Spence for rail carriers.

[fol. 35] Harry C. Ames, Phil G. Safford, J. R. Van Slyke, L. D. Chaffee, Nuel D. Belnap, Luther M. Walter, John S. Burchmore, Charles E. Cotterill, and Frank Lyon for water carriers.

P. M. Ripley, V. K. Raymond, R. W. Kruse, William A. Angus, C. R. Hillyer, W. W. Tommins, J. F. Harahan, Robert E. Quirk, Lowe P. Siddons, Elmer Westlake, and Parker McCollester for sugar refiners and manufacturers.

John J. Esch, Lachlan Macleay, Cleveland A. Newton, C. B. Bee, H. L. Bennett, I. G. Bentley, Edgar Moulton, C. A. Mitchell, H. E. Ketner, Carl Giessow, Ray Williams, W. A. Knight, Charles R. Seal, H. J. Wagner, H. E. Manghum, T. D. Geoghegan, George W. Thomas, Edward E. Wheeler, E. R. Griffin, H. F. Lambert, Stephen H. Love, and M. P. Hester for other parties.

Report of the Commission

By the COMMISSION:

These five cases represent collectively a contest among railroad, water, and motor-truck carriers for that great volume of carload sugar traffic which moves from Atlantic and Pacific coast and Louisiana cane-sugar refining points and from interior beet-sugar manufacturing points to central territory and certain middle western points, and particularly to Chicago, Ill., the country's largest market. They, of course, involve indirectly business strife among sugar interests having plants at competing origin points. In the main they embrace the same traffic as Sugar Cases of 1922, 81 I. C. C. 448, out of which came a general readjustment of the all-rail sugar rates, representing a compromise on the part of the principal shippers and rail carriers, which has stood without substantial modification for about 10 years. However, conditions have now materially changed. Into the transportation field have lately come new and powerful competitive forces in the form of water and truck carriers that maintain much lower rates than the rail carriers. They have made serious inroads on the traffic of the latter carriers and are threatening soon to take still more of it. To cope with the situation the respective sets of rail carriers serving the origin groups mentioned are here seeking, independently of each other, drastic, sweeping, and quick reductions in rates. They are doing so with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent. If the proposed reductions do not have the desired result and revenues from sugar go still lower, the rail carriers expect to console themselves with the thought that the present rates, if continued, would cause them even greater losses. In other words, they are willing to make these reductions rather than run the risk of the further losses which continued maintenance of the existing rates might entail. Their proposals are thus largely in the nature of insurance measures against undue losses in the future. The rail carriers feel that they should at least be given an opportunity to test the effect of these reductions. They may consider even lower rates if those proposed are established and do not prove sufficiently effective. They are in poor financial condition and need increased revenue.

While the loss of traffic by the rail carriers is a matter for our serious consideration, the rights of the water and truck carriers and the value of their services to the public must not be overlooked. This is particularly true with respect to certain barge lines operating on the Mississippi, Ohio, and Illinois Rivers under our findings of public con- [fol. 36] venience and necessity. See Procedure Under Barge Line Act, 148 I. C. C. 129; Through Routes and Joint Rates, 153 I. C. C. 129; Application of Mississippi Valley B. L. Co., 167 I. C. C. 41; Application of American B. L. Co., 182 I. C. C. 521; and subsequent reports.

The rail carriers urge that they should be left reasonably free in the exercise of their managerial discretion and that they are within their legal rights in attempting to put the proposed reductions into effect. Protestants' contentions are principally that respondents have abused their managerial discretion, that the proposed reduced rates are not reasonably compensatory, that they are lower than competition justifies, that they would unduly harm the water and truck carriers, disturb long-existing railroad rate relationships, bring on a collapse of the railroad sugar-rate structure, and result in needless sacrifices of revenue.

Rates and other charges referred to herein will be stated in cents per 100 pounds, and the rates of carriers subject to our jurisdiction include the present authorized emergency surcharge of 2 cents, except as otherwise indicated.

Investigation and Suspension Docket No. 3829

Fifth class has applied for years on sugar from eastern cities on and near the Atlantic seaboard to points in central territory. The present fifth-class rates are 35 per cent of first-class. They were established December 3, 1931, in purported conformity with the recent eastern class-rate revision. By schedules filed to become effective November 15, 1932, and later dates, respondents, the standard and differential all-rail and rail-and-water lines of the seaboard, proposed to reduce their rates on domestic and import refined sugar from and to the points just mentioned to 25 per cent of first class for application until March 31, 1933, when the surcharge was to have been eliminated, and by schedules filed to become effective to April 1, 1933, to apply 27.5 per cent of first class for the balance of the year, without the surcharge. The latter rates are only a cent or two higher than rates on the 25 per cent basis with the surcharge added. The date for the expiration of the surcharge has been postponed to September 30, 1933, but no change has been made accordingly in the terms of the suspended schedules. As the 27.5 per cent rates are published to expire December 31, 1933, the fifth-class rates would be reestablished automatically unless other rates were published in lieu thereof. Respondents desire, by the time limitation, to leave themselves free to meet the situation later in the light of their experience and developments in the meantime. Upon protest we suspended operation of the schedules providing the 25 per cent basis until June 15, 1933, and the others until November 1, 1933. No changes are proposed in the present minimum weights, which are 40,000 pounds to points east of the Indiana-Illinois State line and 60,000 pounds west thereof. This case and the one next dealt with are presented on a common record.

During the four-year period from 1929 to 1932 respondents' sugar traffic from eastern refiners to central territory fell from 415,560 tons to 309,590 tons. By far the greater part of this loss of nearly 106,000 tons occurred in 1932. Most of it appears to have been due to the movement of sugar by other carriers, as the best available data indicate that there was only about a 10 or 12 per cent diminution in the country's consumption. During the same period the sugar traffic of the eastern refiners shipped over water [fol. 37] lines operating from New York, N. Y., by the Hudson River, New York State Barge Canal, and Great Lakes increased from 160,450 tons to 269,000 tons. The movement was almost entirely to Chicago, Detroit, Mich., and Toledo and Cleveland, Ohio, Chicago getting perhaps much more than any other city. In 1932 there were likewise shipped to Chicago over the above route about 60,000 tons of sugar brought through the Panama Canal from San Francisco Bay points and 73,000 tons of import sugar. There was also a movement of 10,000 tons of refined sugar from Havana, Cuba, to Chicago by ocean steamer as far as Montreal, Canada, and thence by lake vessel to Chicago. The water-borne sugar was not all consumed at the lake ports, large quantities having been stored and later distributed by rail or truck to interior points, principally in the southern part of Michigan and the northern parts of Illinois, Indiana, and Ohio. The equivalent of two carloads per week moved by truck from New York City to Akron and Canton, Ohio. There was a large movement in barges from the New Orleans, La., district to St. Louis, Mo., and Peoria and Cairo, Ill., whence it was distributed into Illinois and western Indiana. There was likewise a substantial movement by barge from the New Orleans district to Evansville, Ind., whence it was distributed inland. Cincinnati, Ohio, and Louisville, Ky., received sugar by barge from the New Orleans district and no doubt shipped out some to the interior. Central territory is practically surrounded by water-competitive points that distribute water-borne sugar.

Seeing their traffic slipping away, respondents set out to regain it or at least minimize their future losses. They consulted shippers, gathered data as to the water and truck rates and the value of the water and truck services, and became convinced that substantial reductions in their rates were necessary. They first decided to meet the situation by generally reduced rates from the East to central territory on the domestic sixth-class basis, subject to the exception that the port differentials generally applied on import traffic were to be applied to both import and domestic sugar. In July, 1932, they accordingly applied to us for certain circuitous-route fourth-section relief incident to the exception mentioned, but the application was soon withdrawn because of the delay entailed and because of technical tariff complications.

By the proposed rates, representing reductions of about 27 per cent, respondents hope to divert sufficient traffic from the water and truck carriers to more than offset the revenue they would lose on the traffic that would move by rail regardless of the reductions. The reductions would result in a loss of revenue if respondents did not increase their sugar traffic by about 40 per cent, or 125,000 tons. If a revenue loss results, respondents, as already indicated, are willing to take it to avoid the greater loss that might result from continued maintenance of the present rates.

Respondents are not undertaking to meet the water and truck competition with exactitude at any particular point. They regard the competition as too widespread and the situation as too involved to be so dealt with. They are proposing general reductions because they are convinced that the general level of their sugar rates, though reasonable, is too high as a practical business proposition. Within and between trunk-line and New England territories they have already reduced their rates to the class basis here proposed. Their schedules providing these reductions, filed at about the same time as the ones here under review, were protested but not suspended.

[fol. 38] Just what rates the water carriers are charging is impossible to say. Being unregulated, they do not have to publish their rates, are free to change them at will without previous notice, may pay rebates, give allowances, make absorptions, provide storage, perform special services, allow special privileges, and otherwise, secretly or openly, favor individual shippers. The record indicates that these things, representing concessions of several cents per 100 pounds, are indulged in to a very considerable extent by water carriers from New York. As they are matters particularly within the knowledge of the water carriers and as those carriers have not offered us sufficiently definite advice in regard thereto, we may be justified in giving respondents the benefit of any doubts. What is here said about the water rates is also more or less true of the truck rates. The water and truck-rate data used herein were compiled in 1932. There is no telling whether or not the same rates will be applied this year. They may be several cents higher or lower.

The indications of record are that most of the eastern refined and import sugar that went through the New York State Barge Canal in 1932 moved from New York to the lake ports of Chicago, Detroit, Toledo, and Cleveland at an initially charged rate of about 27 cents, generally subject to a minimum of 200 tons. By "initially charged" rate we mean the rate applied when the shipment was billed out, as distinguishable from the rate ultimately charged under any rebating arrangements, which may or may not have included free accessorial services. In many instances, affecting a large portion of the traffic, the rates initially charged ranged from 22 to 25 cents. Rates of 22 and 23 cents were more or less generally available to Cleveland and Detroit. Those to Cleveland were applicable even during the winter, trucks being used by the lake carriers instead of vessels west of Buffalo, N. Y. The rates mentioned generally included the cost of loading, unloading on warehouse floors or into cars at the destination water front, and marine insurance. Some included a month's free storage. A large eastern refiner was quoted a rate from New York to Chicago of 16.25 cents, subject to a 2,000-ton minimum, but it did not include loading, unloading, and marine insurance, which cost about 5 cents. Another was quoted a rate of 18 cents, which included marine insurance and unloading at a specified wharf. Neither of these rates was used, however, as they were quoted by weak lines; the refiners preferred to patronize the strong standard lines. The through all-water rate charged on half the Cuban refined sugar moved as previously indicated from Havana to Chicago was 27.5 cents and that on the other half 33.5 cents. These rates were exclusive of marine insurance, which amounted to about 4 cents, but included unloading at a specified wharf at destination. A rate of 32.25 cents, minimum 20,000 bags, was quoted for application from a New Orleans wharf by seatrain to New York and thence to Chicago by river, canal, and lake. The average rate initially charged from New York on the traffic moved by water was evidently less than 27 cents, but perhaps more than 22 cents, and probably about as low to Chicago as to the lake ports east thereof. The truck rate from New York to Canton and Akron was 32 cents. From New Orleans the barge rates, inclusive of loading, unloading, and marine insurance, were generally 44 cents to Cincinnati and Louisville, 42 cents to Evansville and St. Louis, 39 cents to Cairo, and 43 cents to Peoria. One barge line, however, maintained rates 3 cents lower to most of these points. Another announced rates to most of the Ohio River cities of 25 cents or there-[fol. 39] abouts, but these were increased 3 cents in the late Fall. They did not include loading. In the case next considered we deal in more detail with barge rates from the New Orleans district to St. Louis and Ohio River cities. With the opening of the Illinois Waterway this Spring a through navigable route is available between New Orleans and Chicago. Rates that would meet the competition of water lines from New York to Chicago may soon be announced by barge operators from New Orleans. The truck rates that apply from the lake-port and river-landing cities to interior points for hauls up to about 150 miles apparently range from about 7 to 18 cents.

Terminal expenses at the lake-port and river-landing cities on water-borne sugar exceed those on sugar that moves by rail. As the water-borne sugar comes in large quantities, most of it must be stored until disposed of. The period of storage varies widely, but stocks accumulated in the late Fall to provide for the four or five-month period of closed navigation are, of course, subject to the most storage expense. There are various transfer services. For instance, some of the sugar may go directly from the water craft to trucks for immediate distribution locally or to the interior, some from the water craft to a warehouse at the water front for later distribution, and some switched or trucked from the water craft to a distant factory or warehouse in the same city for immediate consumption or later distribution. The total terminal expenses vary from perhaps nothing to 8 cents. The indications are that they ordinarily amount to 3 or 4 cents. They are greater at Chicago than at other lake ports. Most of them are avoided in shipping by rail, except on the limited amount of rail-carried sugar that is stored pending distribution.

After inquiring into the question of what the water and truck rates are and what should be added roughly to represent unknown amounts for storage, switching transfer, and other services, we are faced with the question of how much more the rail service is worth in actual practice. Rail shipments generally reach destination in from four to six days, but water shipments are on the way two or three weeks. Rail service is also superior in that it is safer, involves less handling of and damage to packages, is more regular, and otherwise more dependable. Shipments by rail can be reconsigned or stopped in transit for partial unloading at nominal charges. However, unlike water service, rail service does not include loading and unloading, which cost the shipper perhaps 3 or 4 cents per 100 pounds. Water service can be used for a large part of the traffic without great inconvenience or disadvantage, rapid transit being generally unnecessary, but in certain respects, particularly at times, water service is not suitable for special shipments. Sugar lends itself to storage in large quantities, and distribution from warehouses by truck in small amounts is popular with the trade. Water service is never more desirable than rail service, except for reasons of economy or where slow movement is desired as a substitute for storage or in the case of a rising market. The traffic manager of one of the New York refiners testified that he would expect to ship a reasonable proportion of his sugar by rail at a rate 10 cents above the water rate. He thought that that difference would provide equality of opportunity for the rail lines as against the water lines. This expression would be more helpful if we were sure that most of the shippers concurred therein. During these days when business men have to watch every penny there is a strong inclination to use the cheapest mode of transportation, even though not altogether satisfactory. It would also be more [fol. 40] helpful if we knew what the water rates were. If some water shipments pay 22 cents and others as much as 27 cents, the question arises as to what the rail rate should be.

The following table shows the standard lines' all-rail column 27.5 rates proposed for application to sugar, not to be increased by the surcharge, to representative points:

To	From			
	Boston, Mass.	New York, N. Y.	Philadelphia, Pa.	Baltimore, Md.
	Cents	Cents	Cents	Cents
Youngstown, Ohio	34	30	27	26
Canton, Ohio	35	31	29	27
Akron, Ohio	35	32	29	28
Cleveland, Ohio	34	32	29	28
Columbus, Ohio	38	34	32	29
Toledo, Ohio	36	34	34	33
Cincinnati, Ohio	41	37	35	32
Flint, Mich	36	35	35	35
Detroit, Mich	36	34	34	33
Grand Rapids, Mich	39	39	39	37
Indianapolis, Ind	41	39	37	35
Louisville, Ky	43	41	39	36
Evansville, Ind	46	44	42	40
Traverse City, Mich	43	42	42	42
Chicago, Ill	42	42	40	39
Peoria, Ill	45	45	43	41
St. Louis, Mo	48	46	44	42

The proposed rates of the differential lines, operating over circuitous rail routes and by ocean-and-rail, rail-and-lake, or ocean-rail-and-lake, particularly to points in the western half of central territory, range several cents lower. For instance, the proposed rate from New York to Chicago over a circuitous ocean-rail-and-lake line operating through New England and Canada is 35 cents, compared with the proposed all-rail rate of 42 cents.

The proposed rates from Philadelphia, Pa., and Baltimore, Md., range from 1 to 5 cents lower than those from New York, not because there is any water competition that justifies the differences, but because these cities are generally closer to central territory and under the distance adjustment naturally get the benefit of their location.

The proposed rates, like respondents' present rates, increase substantially with distance as we proceed westward, but the water rates from New York do not, being apparently much the same to all ports west of Buffalo. The water-truck combinations increase according to distance as we proceed in various directions from the lake ports and the river landings. As a result of this crossfire the proposed rates to some points are unquestionably too low and to others certainly too high from a competitive standpoint. Exact comparisons for the purpose of illustrating the situation are difficult to make. They depend upon the distance of the destination from the seaboard, the lake-port or river-landing used for making the combinations of water and truck rates, the lengths of the truck hauls, the assumed amounts of the water and truck rates, and the amounts, [fol. 41] if any, added for lake port or river landing storage, switching, and transfer charges. To many points in southeastern Michigan, northeastern Indiana, and northern Ohio the proposed rates are about the same as, if not somewhat lower than, the water-truck combinations on Lake Erie ports, and to many points in southern Ohio and Indiana they are much lower than the water-truck combinations on Cincinnati and Louisville. Even to some water-competitive points, Cincinnati and Cleveland, for instance, they are about as low or lower than some of the water rates. To some interior points, even the present rates might be low enough. However, with respect to many other points, the reverse is true, particularly so far as those in the western-southwestern half of central territory are concerned, where respondents are less interested, because there the proposed rates reflect the upper measures of the all-rail scale, while the water rates from New York to Chicago and from New Orleans to Chicago, St. Louis, Peoria, Cairo, and Evansville plus the truck rates beyond make low combinations. Respondents urge that the proposed rates to the interior points on the whole approximate the water-truck combinations, and that this substantial parity is necessary if respondents are to have equality of opportunity with their competitors, for a dealer in central territory may order sugar in comparatively small quantities from nearby lake-port and river-landing cities and get quick delivery by truck, whereas if he bought at the seaboard he would have to order a full carload or join with other parties in ordering such a shipment.

Meeting the competition at each point in central territory only where and to the extent that it exists would obviously warrant much lower rates as some water-competitive points, such as Chicago and St. Louis, than at interior points, and lower rates at some interior points than at other points intermediate thereto, but respondents decided not to adopt that method of dealing with the situation, as they realized that the establishment of the necessary rates would be long delayed, if not prevented, by fourth-section complications. If the rates to points like Chicago and St. Louis were made much lower than respondents propose and the long-and-short-haul rule observed, they would cut far back into the interior and result in lower rates to many interior points than are proposed and entail undue revenue sacrifices. Morever, the public gets certain commercial and economic benefits from the observance of the long-and-short-haul rule, and ill feeling is avoided. However, respondents may later seek supplementary reductions and fourth-section relief to meet the competition at such points as Chicago and St. Louis, especially of the lower rates to those points now proposed by the carriers from Louisiana points and Savannah, and hereinafter considered, become effective. Prior to Federal control, to meet competition from New Orleans, respondents maintained under appropriate fourth-section authority lower rates from the Atlantic seaboard to points in this territory, such as St. Louis, than to intermediate points, such as Indianapolis.

The record clearly indicates that the proposed rates to Chicago and other points in the western-southwestern half of central territory are not sufficiently low to bring respondents a relatively large amount of additional traffic, but they should attract much, if not most, of the business to points in the eastern-northeastern half of that territory, particularly interior points. Respondents, by securing the traffic to the interior points would stop most of the distribution from Lake Erie ports and upper Ohio River lands and thus confine the water movement to those points prin- [fol. 42] cipally to sugar for local consumption. They feel that if they must practically give up the traffic going to Chicago and some of the other water-competitive points for local consumption, they should be allowed to take most of the traffic destined to the interior.

Refiners favor the reductions. They have no particular interest in the intrinsic level of properly related rates, as the freight charges are generally borne by other parties, but they prefer to use the railroads for most of their traffic if the rates of the different transportation agencies were on a parity, service considered. They desire the rail lines to be strong and dominant in the field of transportation. They are less interested in the other carriers, because the rates they charge are unknown, unstable, result in discrimination, and have the effect of disturbing the sugar-price structure. Delivered prices of sugar in central territory are generally made on the seaboard refinery base price plus the "freight selling basis;" which is the amount added to the base price to make the delivered price at a given destination. Formerly the freight selling basis generally represented the rail freight rate from the refinery having the lowest rate to that destination, but recently it has come to reflect water or water-truck rates, particularly if the amount of sugar moved at such rates is sufficient to control the delivered price. The freight selling basis at Chicago, for instance, which a couple of years ago was 49.5 cents, representing the rail-and-lake rate from Philadelphia, is now 32 cents, or 5 cents above the maximum water rate from New York. Some sugar was recently sold there on a 27.5 cent basis. The freight selling basis may in instances reflect not merely rates but sales efforts, market gluts, and other trade conditions. A considerable quantity of sugar is not now being bought delivered at destination on the freight selling basis, but f. o. b. refinery. In such cases the buyer arranges his own transportation and obtains such freight rates as he can. This has been one of the chief causes of the unsettlement and uncertainty in the sugar-price situation.

The Mississippi Valley Barge Line Company, a privately-owned water carrier operating between New Orleans and Mississippi and Ohio River cities, protests the proposed rates, except those from New York to Chicago and the other lake ports, principally on the ground that the proposed rates, particularly to interior points, are lower than necessary. It suggests that if respondents desire to meet the competition, they should do so, not by general reduction to a uniform basis, but by treating the rate from and to each point on its individual merits. Rates so made would involve general departures from the long-and-short-haul rule, which respondents desire to avoid, as already explained. Central territory is so hedged about by water-competitive points that protestant's idea is impractical. Moreover, the interstate commerce act contains such an affirmative prohibition of departures from the long-and-short-haul rule, except where a carrier is willing to create them and can justify them, that we should be extremely hesitant about forcing a carrier into a positon where it would have to depart from the rule or forego the traffic. [fol. 43] This feature of the case is distantly similar to Cement From Hudson, N. Y., 186 I. C. C. 8, where the Boston and Albany Railroad proposed reduced rates to meet truck competition to certain destinations and proposed to apply them also to intermediate points where there was no competitive necessity. We found that the reduced rates were justified to the more distant points but not to the intermediate points, and granted fourth-section relief accordingly. In that case, however, respondent practically applied for fourth-section relief, its counsel having stated upon argument that it had no desire to reduce its rates to intermediate points, but did so only because of the requirements of section 4 and that it was agreeable to a grant of fourth-section relief.

One of the principal protestants is an organization representing seven water carriers, operating on the New York State Barge Canal, which handle about 75 per cent of the total freight traffic moving through that waterway. One of the largest canal carriers, however, is not a member of the organization and took no part in the case. Some of the water craft of these carriers are modern motor ships that operate all the way between New York and Chicago, while others are barges that operate only east of Buffalo or Oswego, N. Y., their cargoes being transshipped at those points. None of the connecting lake carriers is before us. The protesting organization has formed a conference which has for one of its objects the discontinuance of rate cutting and rebating. Though it has apparently not yet accomplished much in the way of tangible results, its members hope that in 1933 they may be able to stabilize their rates on a higher level than obtained in 1932. Their traffic is principally eastbound grain and they accordingly have a great surplus of space westbound. The sugar traffic was practically the only traffic westbound in 1932 that did not show a falling off since 1929. Except for petroleum products, moving in tank barges, sugar in 1932 constituted over half of their westbound traffic and they are not disposed to give it up. They threaten reprisals in the shape of retaliatory rate reductions in the event respondents put the proposed rates into effect. They indicate that if they can not hold the sugar traffic they may raid other westbound traffic now being handled by the rail carriers. Whether their rates last year were on rock bottom and whether out-of-pocket operating expenses would permit them to go lower, we are unable to say.

[fol. 44] The Farmers & Manufacturers Beet and Sugar Association, an organization of sugar-beet and beet-sugar producers in southeastern Michigan and adjacent portions of Ohio and Indiana, protests. The industries it represents furnish employment for thousands of farmers and factory hands and provide central-territory carriers with a heavy traffic, not only in sugar beets and beet sugar, but also in coal, coke, and lime rock. Their beet sugar is distributed almost entirely in central territory in competition with cane and beet sugar from other parts of the country. It is ordinarily sold delivered at a differential of about 15 cents per 100 pounds below the delivered cane-sugar prices made by adding to the seaboard price the freight selling bases, above described. The beet-sugar producers absorb, pocket, or "pick up" the differences in rates after deducting the price differential. Freight selling bases in central territory, many of which, because of low water-truck rates, are already below the former level based on rail rates, would be reduced, perhaps 10 cents on the average, and automatically result in reduced returns for beet-sugar manufacturers. Under a contract which makes the prices paid for sugar beets dependent on the returns of the sugar manufacturers, the losses, roughly estimated by protestant at $400,000 per year, would be divided between the farmers and manufacturers. Protestant urges that this would not be in the public interest, particularly in these times of general business depression and low commodity prices. To meet truck competition the rates from these beet-sugar producing points to much, if not most, of central territory were generally reduced last October to a maximum of 25 per cent of first class, many important rates being on even lower levels. The new rates were first published to apply until March 31, 1933, but are now published to continue until August 31, 1933. The manufacturers are still patronizing the trucks to a large extent and the rail carriers are giving consideration to the advisability of further extending the life of the reductions. As a rule the rates from the beet-sugar producing points are considerably lower than the present and proposed rates from the seaboard, as they apply for much shorter distances. While the proposed reductions from the seaboard are on a higher relative maximum rate basis than those which were made last Fall from the beet-sugar producing points, they are naturally greater in cents per 100 pounds. Protestant urges that they would result in undue prejudice. Some of the carriers which serve the sugar-beet and beet-sugar territory and do not serve the seaboard are not favorably inclined toward the proposed rates, as they desire to protect the interests on their own lines, but they are in the minority and for various reasons find it desirable, or are forced, as a practical matter, to concur therein.

Like the other class rates from and to the points in question, the proposed sixth-class rates from Norfolk, Va., exceed those from Baltimore. The Norfolk Port-Traffic Commission objects. With respect to import class rates the two ports have for years been on a parity, but the application of these rates to sugar is proposed to be canceled because they exceed the proposed rates. The Virginia rail carriers desire to continue the parity on import sugar and the others are willing to give the matter serious consideration. Civic and commercial interests of Richmond, Va., ask for import rates no higher than those that may be applied from Norfolk. With such a one-sided showing we can only conclude that Baltimore, Norfolk, and Richmond should be on a parity with respect to import sugar.

No question can fairly be raised as to the proposed rates being high enough to yield considerably more than the cost of the service. They are not in the lower reaches of the scale. Sugar loads heavily, and it can probably be used to fill cars that would otherwise move west empty. The earnings on a normal shipment, about 50,000 pounds, at the [fol. 45] proposed rates from and to the principal points would range from about $145 to $210 for hauls ranging from about 500 to 900 miles. They would compare favorably with those under many rates prescribed by us on other commodities.

We find that respondents have justified rates made 27.5 per cent of first class, without the surcharge. Respondents are hereby authorized to establish such adjustment on one day's notice. An order will be entered vacating our order of suspension and discontinuing this proceeding.

Investigation and Suspension Docket No. 3814

By schedules filed to become effective October 1, 1932, and later dates, respondents, operating on both sides of the Mississippi River, propose to reduce their rates on sugar from New Orleans, Savannah, Ga., and other southern refining points to Chicago, St. Louis, other points in the so-called Illinois district, including points on the west bank of the Mississippi River in Iowa and Missouri, and points as far north as Madison, Wis., but exclusive of Milwaukee, Wis., also to points in the territory intermediate thereto, principally in western and southern Indiana, and most of Kentucky and Tennessee, excluding Memphis, Tenn. Upon protest we suspended operation of the schedules until May 1, 1933. As the 2-cent surcharge was originally authorized to apply only until March 31, 1933, the schedules, for merely technical reasons, were by their terms limited to expire on that date, but respondents have announced their purpose of establishing the same total sum as rates for permanent application when and as the surcharge expires. In other words, the surcharge is to be added to, and merged into, each proposed rate and become an integral part thereof.

Respondents are hauling practically no sugar from and to the points considered. Nearly all of the Louisiana production sold in the destination territory mentioned and in contiguous territory goes by barge as far as St. Louis, Cairo, Peoria, Evansville, Louisville, Cincinnati, or Memphis, whence it is distributed to the interior as described in the first considered case. Most of it apparently did not get as far north as Chicago. In 1932 the barge movement amounted to over 500,000 tons, about 10 times as much as moved all-rail from Louisana points to the same territory. There were 4,000 tons from Savannah to Evansville and Louisville. By far the greater part of the water-borne traffic was carried by the Federal Barge Line, operated by the Government-owned Inland Waterways Corporation, on local rates or joint rates with the delivering rail carriers. A small proportion was similarly taken by the Mississippi Valley Barge Line and some by the American Barge Line Company. All three of these carriers, hereinafter called the standard barge lines, operated in connection with rail lines under our certificates of public convenience and necessity. The American Barge Line, much of whose business is merely towage service, does not have a complete system of joint rates on sugar in connection with rail lines, but has some arrangements of similar nature with truck lines. The two latter-named carriers took some sugar at lower rates than were charged by the Federal Barge Line. They do not adhere absolutely to the usual differential basis on all traffic. Tramp, or contract, barge operators obtained considerable tonnage at still lower figures.

Until a few years ago respondents enjoyed the long hauls from the origin points on practically all this traffic, but now they generally receive only the hauls beyond the river-landing destinations on that part of the traffic which is not distributed therefrom by truck. The all-rail movement from Louisiana is now confined almost entirely to occa- [fol. 46] sional, special, or emergency shipments. The diversion of the sugar traffic to the barge lines in 1932 cost the Illinois Central Railroad Company, the principal respondent, probably half a million dollars in revenue. This loss was due to the fact that respondent generally received on the traffic here considered only the revenue for the hauls beyond the river-landing destinations, based on its divisions of the joint rates with the barge lines, whereas previously it received the through charges for the long hauls from the refineries to the final destinations.

Respondents are here seeking not only some of the traffic which might otherwise move by barge lines from the New Orleans district, but naturally some of that which might otherwise come from different sources of supply, particularly that by water from New York and California. The prosperity of respondents depends upon that of the territory they serve and sugar refining is one of the principal industries on their lines in the South. The refiners there depend for their existence largely on their sales beyond the Ohio River and respondents accordingly desire to keep the northern markets open to them. Incidentally, the barge lines have already done much to that end.

Respondents propose two separate bases of rates from and to practically all the points considered, one subject to an 80,000-pound minimum and the other, on a somewhat higher level, subject to a 60,000-pound minimum. The rates with the 60,000-pound minimum are counterparts of the eastern carriers' proposal just considered, the proposed rate from New Orleans to Chicago, in accordance with a long-standing arrangement, being the same as that proposed from Baltimore to Chicago. However, respondents feel that these rates are too high to attract much business and for that reason they propose the lower rates based on the 80,000-pound minimum, leaving those on the 60,000-pound minimum for dealers, principally at small interior points, who require limited quantities of sugar or whose storage facilities are limited. The lower rates would be used on most all the traffic, as they would result in the lower per-car charges except on shipments weighing not much in excess of 60,000 pounds. We will deal specifically only with these rates. The protests and the record relate to them almost entirely. The present minimum weight is 60,000 pounds, except to points on and south of the Ohio River, where it is 40,000 pounds. The present and proposed rates, as shown by the record, from the New Orleans district to the principal destinations are shown in the following table:

[fol. 47]

		Rates		
		Present	Proposed	
To	Distance Miles	Minimum 60,000 pounds to points north of Ohio River and 40,000 pounds to points on and south thereof Cents	Minimum 80,000 pounds Cents	Minimum 60,000 pounds Cents
Chicago, Ill	912	56	30	39
Madison, Wis	997	58.5	..	41.5
Dubuque, Iowa	1004	62	34	43
Peoria, Ill	830	56	30	39
Indianapolis, Ind	831	56	30	39
Cincinnati, Ohio	836	56	30	36
Louisville, Ky	747	56	30	36
Evansville, Ind	687	53	28	34
St. Louis, Mo	698	52	28	34
Cairo, Ill	554	48	28	30
Lexington, Ky	754	56	30	36
Chattanooga, Tenn	498	45	28	34
Covington, Tenn	432	43	28	

Respondents propose to accord Savannah the same basis as New Orleans on traffic to Chicago and to apply the Chicago rate as maximum at intermediate points. This will result in a parity also at Indianapolis and Ohio River cities.

No reductions are proposed in the standard barge and barge-rail rates from Louisiana points to the destinations considered, which rates are generally 10 cents lower than the all-rail rates. However, if the all-rail rates are reduced the barge lines will consider the establishment of lower rates. The 10-cent differential at present maintained represents 20 per cent of the New Orleans-St. Louis all-rail rate of 50 cents, before adding the surcharge, the barge rate to St. Louis being made 80 per cent of the all-rail rate, and the resulting differential reflected in the joint barge-rail rates.

There are only two proposed rates that are of particular importance. One is the 30-cent rate to Chicago, which is blanketed back over direct routes almost as far south as St. Louis and over indirect routes via Louisville and Cincinnati almost into Tennessee, except that it would not apply to points on eastern lines. The other is the 28-cent rate to St. Louis, which is blanketed back into Kentucky and Tennessee, filling the territory south of the 30-cent blanket, until it meets the present existing lower rates at points in western Tennessee, and northern Mississippi, Alabama, and Georgia. The rates in the coastal-plains section of the Southeast were reduced last August to meet truck competition. They had been on the basis of 27.5 per cent of first class, prescribed for all the Southeast in Southeastern Sugar Investigation, 132 I. C. C. 477, but now range from about 15 to 20 per cent of first class.

The proposed rate of 30 cents from the New Orleans district to Chicago represents a 26-cent reduction in the present rate of 56 cents. The basis for the amount of the proposed rate is the New York-Chicago water rate, which we saw in the above-considered case was last year probably somewhere between 22 and 27 cents, but to which several cents should be added to represent extra terminal expenses [fol. 48] and rail service superiority. Protestant Mississippi Valley Barge Line suggests that we hold respondents to a rate of 40 cents at Chicago, which is the proposed rate that would have applied from New York to Chicago until March 31, 1933.

From the New Orleans district to St. Louis the proposed rate is 28 cents, 2 cents below that proposed to Chicago. It represents a reduction of 24 cents, the present rate being 52 cents. The standard barge-line rate from the New Orleans district to St. Louis was 42 cents, except that the Mississippi Valley Barge Line maintained a rate of 37 cents. This rate was established in anticipation of an announced contemplated reduction of 4.5 cents in the all-rail rate from Louisiana points to St. Louis due to the reduction in the fifth-class rate from Baltimore to Chicago brought about by the eastern class rate revision. The 28-

cent rate is based on competition with contract-barge operators on the Mississippi River. Rates from the New Orleans district to St. Louis as low as 19 cents have been quoted by contract-barge operators for the movement of large cargoes and a rate of 18 cents for this service is regarded as compensatory by parties that should be in position to know, but, so far as appears, such rates have not been used. The contract rate generally paid by one of the principal Louisiana refiners was 20 cents. It covered only transportation and did not include loading, unloading, or marine insurance. The charges for these incidental items, according to one of respondents' witnesses, an official of the refiner mentioned, was between 3 and 4 cents, but according to protestant's witness, a traffic official of the Mississippi Valley Barge Line, they are more nearly 9 cents.

The refiner has found from experience that it costs about 1 cent more to get sugar to the barges than on to the cars at point of origin, the average marine insurance charge is a little over three-quarters of a cent, and the average unloading and transfer charge at destination actually paid for movement from the barge to a nearby warehouse was generally 1.5 cents. Therefore, the total cost of shipping sugar by contract barge from New Orleans to St. Louis, according to respondents' witness, appears to be at least 23 cents. Protestant's witness estimates that the incidental charges for loading and unloading should be 2.5 cents and 3 cents, respectively, apparently assuming that there is no loading cost on shipments forwarded all-rail. His estimate of marine insurance charges corresponds substantially with that of respondents' witness. He estimates an expense of 2.5 cents at destination for switching and drayage, which is not borne out by the refiner's experience, but might represent other shippers' experience. He includes an item of one-quarter of a cent for damage due to a greater amount of handling of the package when shipped by water. Accepting protestant's estimates would make the rate from New Orleans to St. Louis 29 cents. Incidentally, the freight selling basis at St. Louis was at times, if not more or less generally, 30 cents, which fact, protestant says, supports its estimate.

The traffic manager of one of the principal refiners suggested 6 cents as a proper differential for the standard barge lines under the all-rail lines. Accepting here a differential of 6 cents for the purpose of discussion and adding it to the 23-cent minimum contract-barge cost, on account of the superior service of the rail lines, makes 29 cents as a minimum from New Orleans to St. Louis, or 1 cent more than the corresponding proposed all-rail rate. Accordingly, even without taking into consideration the fact that most of the river-borne sugar must be stored longer pending distribution, the 28-cent rate may be too low from a competitive standpoint. If the usual 20 per cent differential were applied to that rate, it would reduce to 22.5 [fol. 49] cents the standard New Orleans-St. Louis barge rate, which would apply for a much more regular and perhaps otherwise more dependable, desirable, and valuable service than the contract-barge operators provide. It would no doubt stop the use of the contract barges. The maximum all-rail rate from the New Orleans district to St. Louis that would be necessary to narrow the regulated barge lines' differential to about 6 cents, if the 20 per cent basis were used, is 31 cents. The Mississippi Valley Barge Line suggests that we hold respondents to a rate of 38 cents at St. Louis, which, provided the 20 per cent basis is continued, would reduce the differential in its favor from 10 cents to 7.5 cents, and give protestant a rate of 30.5 cents. A 38-cent rate for respondents from the New Orleans district to St. Louis would far exceed the water rate from New York to Chicago. If the long-and-short-haul rule is to be observed, the rate from the New Orleans district to St. Louis can not exceed that from the same district to Chicago.

The proposed rate from the New Orleans district to Cincinnati and Louisville is 30 cents, the same as to Chicago, and that proposed to Evansville and Cairo 28 cents, the same as to St. Louis. As was stated in connection with the previously considered case, the standard barge rates, in 1932, inclusive of loading, unloading, and marine insurance, were 44 cents to Cincinnati and Louisville, 42 cents to Evansville, and 39 cents to Cairo. One of the standard barge lines, however, maintained rates several cents lower. Another would deliver Louisiana sugar at most of the Ohio River cities for about 26 cents until late Fall and 28 cents thereafter. This figure did not include loading. The water rate from Savannah to Louisville was 37 cents. Approval of the proposed rate and application of the 20 per cent differential for the standard barge lines would make rates from the New Orleans district for those lines of 24 cents to Cincinnati and Louisville and 22.5 cents to Evansville and Cairo. The Mississippi Valley Barge Line suggests that we hold respondents to rates of 43 cents to Cincinnati, Louisville, and Evansville, and 38 cents to Cairo. Cairo interests urge that the proposed rates should be lower to Cairo than to St. Louis, because the distance is shorter.

While, as we have seen, the eastern carriers are making no special effort to meet the competition at any particular point, the southern lines are doing just the opposite, so far as Chicago and St. Louis are concerned. Respondents are more interested in reaching these markets than are the eastern carriers and their revenues would be less adversely affected by applying their proposed Chicago and St. Louis rates as maxima at intermediate points than would the revenues of the eastern carriers, if the latter adopted those rates and followed the same policy.

The proposed rates to the water-competitive points, as applied also to the interior points in the intermediate territory, are generally lower than the water-truck combinations. The record does not afford exact figures, but we can illustrate the situation by rough estimates. The truck rates for distances up to about 150 miles probably range from 7 to 18 cents. Adding these figures to the New York-Chicago water rates, ranging from 22 to 27 cents, we have combinations to central and northern Illinois points ranging from about 29 to 45 cents, to be compared with the proposed all-rail rate of 30 cents. Adding similar truck rates to standard and contract-barge rates ranging upward from at least 23 cents from the New Orleans district to St. Louis, Peoria, Cairo, Evansville, Louisville, Cincinnati, and Memphis would produce rates to interior points both north and south of the Ohio River more or less similar to those made [fol. 50] to Illinois points on the Chicago combination just mentioned. Accordingly, the usual water-truck rates to interior points north and south of the Ohio River are probably from 5 to 15 cents higher than the proposed all-rail rates of 28 and 30 cents. This situation could be avoided by respondents giving up most of the business at water-competitive points or departing from the long-and-short-haul rule, but they do not desire to do either. The proposed rates, as applied to the interior points alone, would probably bring respondents a heavy traffic, would stop a large part of the distribution of water-borne sugar, and dry up much of the water movement.

Protestants urge that the proposed rates to interior points are less than necessary to meet competition, particularly in view of the superior service by rail, and would be unduly detrimental to the water and truck carriers. Respondents explain that the proposed rates to the water-competitive points are blanketed to the interior not only because of uncertainties and difficulties attending applications for fourth-section relief, but because they consider it desirable from a commercial and economic point of view to keep interior dealers on a parity; also to avoid a complicated rate structure, rate controversies, and ill feeling; and because low rates from the New Orleans district are needed to offset the disadvantages some dealers would suffer in ordering an 80,000-pound carload, when they can follow a hand-to-mouth policy, buying in small lots from a nearby distributing center and receiving quick delivery by truck. One of the main questions in this connection is whether respondents should be allowed to establish a rate to a water-competitive point, Chicago for instance, made solely with regard to water competition at that point, and then blanket it to the interior; whether they should average the situation at all the points, as the eastern lines have done, and publish a higher general basis than they propose; or whether they should establish lower rates to water-competitive points than to the interior and in doing so depart from the long-and-short-haul rule. Prior to Federal control, to meet competition from the East, lower rates were in effect from the New Orleans district to Chicago, St. Louis, and Ohio River crossings than to intermediate points.

The practice of shipping sugar in contract barges developed rapidly last year. At least two of the largest refiners resorted to it as a means of meeting the flood of sugar moving by water from the East and California. One refiner financed barge operations and was thus in position to dictate the rates to be charged. It furnished the contract barges with two-thirds of their sugar traffic. It expects to continue to ship much, if not most, of its sugar this year by barge even if the proposed rates are established. Such use as it would make of the all-rail rate would be during the winter. It seems to have no doubt about its ability to obtain a sufficient supply of contract water craft in the future. The refiners have had no difficulty in this respect so far. Just where they might find sufficient facilities to carry the bulk of the sugar in the future is not clear, but among other privately-owned facilities that may be available are those used for the southbound movement of steel. They were used to some extent last year. Respondents are apprehensive about the situation and are convinced that it requires quick action. They fear that if the present tendency is not stopped all the refiners, to protect themselves, will use contract barges or provide their own barges for most of the traffic. Petroleum, steel, and cotton interests have already entered the river-transportation business to a greater or less extent. One of the main purposes of the proposal is, therefore, to discourage the refiners in providing their own means of transportation or patronizing [fol. 51] operators of contract barges. The mere publication of the proposed rates has already deterred one refiner from increasing its river terminal facilities.

While respondents regard the contract-barge rates as determining factors, standard barge lines do not take them very seriously. The low rates of contract-barge operators have not had the adverse effect on the traffic of the standard barge lines that they have had on the rail lines. In 1932 the standard barge lines, generally with a 42-cent rate to St. Louis, took about nine-tenths of the sugar that moved northbound from Louisiana, notwithstanding the much lower rates of the contract-barge operators. They handled about as much in 1932 as in 1931. The slow, sporadic, and uncertain service of the contract barges is unsatisfactory to some shippers. It is used only to supplement other transportation. Instances are cited in which contract-barge tows took six or seven weeks to reach St. Louis. At times the Mississippi River north of Cairo is difficult to navigate with low-powered tow boats used in connection with the contract barges, because of swift current. The standard barge lines generally make the trip in two weeks.

One outstanding probable effect of the proposed reductions would be a narrowing of the amount of the standard barge-line differential. The present standard barge-line rate from the New Orleans district to St. Louis is 42 cents, which is 80 per cent of the all-rail rate of 50 cents, before adding the surcharge, and the resulting 10-cent differential is reflected in the joint barge-rail rates from Louisiana origins to points beyond St. Louis, on which rates, incidentally, storage in transit is allowed, which permits distribution by rail from the river cities. Indications are that the differential is much too wide from a competitive-service standpoint, for, as we have seen, the standard barge lines are taking most all of the business. If respondents are allowed to reduce their rates as proposed, the barge lines will consider the publication of rates differentially lower. If the 80-per cent basis were continued, it would reduce the differential from 10 cents to 5 cents. The standard barge rate to St. Louis would become 23 cents and the barge-rail rate to Chicago and other points beyond St. Louis, 25 cents, approximating some of the water rates from New York to Chicago. As already indicated, the traffic manager of one of the principal refiners testified that a differential of about 6 cents would probably afford the respective sets of carriers equality of opportunity with the barge line. Others were silent. There is a suggestion from some protestants that respondents should have approached the standard barge line on the subject of a reduction in the differential without the severe reductions in rates here proposed. But a mere reduction in the differential would not put respondents in any better position than they are now to meet the competition of the water lines from New York and the contract-barge competition from the New Orleans district.

The Mississippi Valley Barge Line calls attention to the percentage divisions that would accrue under the joint barge-rail rates reduced according to the usual differential basis in case the proposed rates are established. On traffic to Peoria, Ill., for instance, the barge line from the New Orleans district would get 60 per cent of the rate, or 15 cents, for its service to Evansville, and the rail line the balance, or 10 cents, for its haul beyond. At present, the barge line gets 26 cents and the rail line 18 cents.

The Mississippi Valley Barge Line, with an invested capital of $3,500,000, operates four power boats and 50 barges on the Mississippi and Ohio Rivers on regular schedule. It began active business only two or three years ago and while it has so far operated at a loss, it appears to be well supported financially and its owners and officials have [fol. 52] hopes of making it a successful venture. Its most important traffic is northbound sugar, which constitutes about a third of its total tonnage and yields over 40 per cent of its total revenue. The Federal Barge Line is even more of a sugar carrier, sugar constituting about 50 per cent of its northbound traffic. These standard barge lines get most all the sugar traffic, principally because of their 10-cent differential, which the proposed rates, if the 80-per cent basis is continued, would reduce to 5 cents. If the differential is substantially reduced, the standard barge lines will get less sugar, and lower rates on such of it as they do handle. Barge rates, made on the 80-per cent basis, if applied to the tonnage moved by the Federal Barge Line in 1931, would have cost that carrier about $350,000 and wiped out its showing of net revenue. If applied to the reduced volume that it would probably have received under a differential of about 5 cents, they would have cost it much more. The Federal Barge Line sees no good reason for respondents' proposal, but does not protest. Its policy is, to let the rail carriers set the rate level. Protestant urges that respondents have conspired in restraint of trade and in violation of the anti-trust law to monopolize the traffic. If respondents succeed, the barge lines will be dealt a staggering blow. Protestant suggests that respondents can much better afford to forego this traffic than can the barge lines. The principal traffic of the barge lines consists of a few commodities moving in a limited territory, while respondents' traffic is general in character and their business resources extensive. Although the sugar traffic in its present volume is almost vital to the existence of the barge lines, it would constitute but a small part of the traffic of respondents. For the 4-year period from 1928 to 1931, inclusive, the ratio of sugar tonnage to total tonnage averaged 1.4 per cent for the Illinois Central, 0.2 per cent for the Louisville and Nashville Railroad Company, and 0.5 per cent for the Southern Railway Company.

The Mississippi Valley Association, a corporate organization of shippers in the Mississippi Valley, opposes the reduced rates particularly on the ground that the existence of the barge lines would be jeopardized thereby and that shippers might ultimately be deprived of water transportation.

The National Sugar Refining Company, with plants at New York rate points, protests the proposed rates with the 80-000-pound minimum. It also protests the establishment of any rates on sugar from Savannah to Chicago that are as low as may be concurrently in effect from New Orleans to Chicago. The haul from Savannah is over 100 miles greater and protestant accordingly suggests the addition of 2.5 cents to the New Orleans rate to make the rate from Savannah. There are no water rates from Savannah to Chicago as low as those from New Orleans and New York to Chicago. The Savannah Sugar Refining Company has long sought a parity with New Orleans and strongly supports respondents' proposal.

The Baltimore Chamber of Commerce opposes the rates with the 80-000-pound minimum because they are lower than the proposed rates from Baltimore. Baltimore and Philadelphia are already suffering from the fact that some of the refining formerly done there is being done at New York because of the water rates.

The eastern rail carriers protest the reduced rates with the 80-000-pound minimum. The canal lines from New York protest all the reductions on the grounds indicated in that part of this report dealing with Investigation and Suspension Docket No. 3829.

The central territory sugar-beet and beet sugar interest protest for the reasons indicated in the last-considered case. They point out how low the proposed rates are from the South in comparison with the present rates from the beet-sugar manufacturing points. To Indianapolis, Ind., for instance, the proposed rate from New Orleans is 30 cents, for a haul of 900 miles, as against the present rate of 25 cents from Bay City, Mich., for a haul of 390 miles. [fol. 53] The eastern carriers refused to concur in the reductions from the South and respondents' proposed rates are therefore not published to apply to local points on the eastern lines. If the schedules were approved, the rate from New Orleans to Terre Haute, Ind., for instance, would be reduced from 56 cents to 30 cents, while to Paris, Ill., a nearby point on eastern lines, a rate of 56 cents would remain. Protestant urges that such disparities would be unduly prejudicial. The contention is not supported by any evidence of injury. No one who might be adversely affected appeared. Respondents would publish properly related rates to destinations on the lines of the eastern carriers, if they could get concurrences. The eastern carriers are now willing to join in the rates with the 60,000-pound minimum.

Rates to western points beyond the destinations considered have not yet been specifically considered by respondents. Certain disparities would therefore result from the establishment of the proposed rates. The rate from New Orleans to Davenport, Iowa, for instance, would be reduced from 62 cents to 30 cents, but that from New Orleans to Des Moines, Iowa, for a similar haul would remain at 65 cents. The Mississippi Valley Barge Line makes a point of this fact, but no one who might be adversely affected is before us. In the time available it was impracticable for respondents to cover all the territory which might be affected by the competitive conditions. Respondents expect to deal with these situations on their merits after our decision herein.

The reduced rates to Chicago and Cincinnati are proposed to be applied also to points intermediate thereto in central Kentucky. The eastern boundary of the zone so affected is, with respect to the rates from the New Orleans district, the line of the Southern from Chattanooga, Tenn., to Cincinnati, and with respect to the rates from Savannah, the line of the Louisville & Nashville from Atlanta, Ga., to Cincinnati. Many reduced rates are proposed to points east of these lines, but the reductions are not as great as those to other points. Protest against this difference in treatment is registered by the Eastern-Southeastern Kentucky Jobbers Association, representing chiefly distributors at Harlan, Hazard, Barboursville, and Middleboro, Ky., and other points on main and branch lines of the Louisville & Nashville, in the coal-mining regions, to which the lesser reductions are proposed. Preservation of the existing relationships as among the various destinations is sought. Protestant's members buy their sugar principally in the New Orleans district and distribute it by truck throughout the territory in their vicinity, largely in competition with jobbers at Louisville, Lexington, and other Kentucky points which would be accorded the Chicago and Cincinnati rates. The present rates to points where protestant's members are located and those to competing points are made on the prescribed basis of 27.5 per cent of first class. From the New Orleans district they range from 53 to 62 cents. Those proposed are generally 36 or 41 cents to the points where protestant's members are located and 30 cents to competing points. From Savannah the present rates are lower to all these points than are those from New

Orleans. To many points where protestant's members are located no reductions are proposed from Savannah although some of the points may be intermediate to the competing points. To Hazard the rate would remain at 54 cents, while that to the competitive points would go down to 30 cents. The points represented by protestant are outside the territory directly affected by the intermediate application of the Chicago and Cincinnati rates. They are [fol. 54] not necessarily entitled to the same reductions as the intermediate points. Moreover, the record is meager. There is no definite evidence that the proposed rates would injure protestant's members. Respondents suggest that the prices paid by protestant's members are probably based on the Savannah price plus the freight selling basis, whereas the prices at the competing points may be dominated by the barge rates to Louisville and that it is possible, therefore, that the changes in relationship that would result from the proposed rates would not have any injurious effect, but might be helpful to protestant's members in meeting competition from Louisville and Lexington.

There can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service. The earnings would compare favorably with those of the eastern lines just considered and would generally accrue from single-line straightaway water-level hauls by economically and efficiently operated carriers in a territory of heavy traffic density. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240 per minimum carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26 cents. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15 cents per car-mile and 6 mills per ton-mile. The traffic considered would be principally added tonnage that could probably be carried at far lower costs. Many commodities are handled by respondents at much lower charges than they here propose for sugar. The record affords ample justification for the proposed rates, minimum 60,000 pounds. We are of opinion, however, that the proposed rates, minimum 80,000 pounds, are somewhat lower than the necessities of the situation require, and our findings so recognize.

We find that respondents have justified the proposed rates with the 60,000-pound minimum. We further find that respondents have not justified the proposed rates with the 80,000-pound minimum, but that they have justified rates 4 cents higher. So far as the 80,000-pound minimum is concerned, this means all-rail rates from New Orleans of 34 cents to Chicago and 32 cents to St. Louis. Under the 80 per cent basis for the standard barge lines, it means a barge-rail rate of 27.5 cents to Chicago and a standard barge rate of 25.5 cents to St. Louis. An order will be entered vacating our order of suspension so far as it relates to rates based on a minimum of 60,000 pounds, requiring the cancellation of the remaining schedules, without prejudice to the establishment of rates in conformity with the foregoing conclusions, and discontinuing this proceeding. Respondents are hereby authorized to effectuate the adjustment herein approved on one day's notice.

Investigation and Suspension Docket No. 3837

By schedules filed to become effective December 6, 1932, and later dates, respondents, to meet barge and barge-truck competition, proposed to reduce their rates on sugar from Louisiana refining points to destinations throughout Arkansas, to southern Missouri, and to certain points in extreme eastern Oklahoma. Upon protest we suspended operation of the schedules until July 6, 1933. Subsequently, upon respondents' petition we vacated our suspension order so far as it affected most all destinations in the southern half of Arkansas, and the proposed rates thereto became effective January 3, 1933. Respondents' petition stated, among other things, that the traffic to the southern Arkansas [fol. 55] points was particularly subject to barge and *and* barge-truck competition and that the proposed rates thereto were immediately desirable to move the winter sugar production.

The suspended schedules contain rates to such points as Joplin and Springfield, in southwestern Missouri, but at the hearing respondents orally withdrew such destinations from the case, for the reason that they had no definite advice that the barge-truck movement thereto was large enough to be worth competing for. There still remain for consideration rates to points in Southeastern Missouri, the northern half of Arkansas, and eastern Oklahoma.

All-rail sugar traffic from Louisiana points to the destination territory considered fell to a low figure in 1932. There was also a decrease in the tonnage carried by the standard barge lines. The equivalent of perhaps a thousand carloads went by contract barge up the Mississippi, Red, Black, and Ouachita Rivers to such points as Camden and Calion, Ark., at and near the head of navigation, and up the Mississippi River to Helena, Ark., Memphis, and Cape Girardeau, Mo., whence it was distributed by truck into the destination territory mentioned. Respondents seek to attract and hold some of this water-borne traffic.

The present all-rail rates are on the maximum basis prescribed in the southwestern revision, 30 per cent of first class. Respondents propose two sets of reduced rates, one with a minimum of 80,000 pounds and another on a 5-cent higher basis, with a minimum of 36,000 pounds. The rates with the 80,000-pound minimum range generally from about 25 to 40 cents and average nearly 50 per cent below the present level. The following table, complied from the record, shows distances, present rates, and proposed rates with the 80,000-pound minimum from and to representative points:

From New Orleans To	Distances Miles	Rates	
		Present Cents	Proposed Cents
De Queen, Ark	433	53	27
Bald Knob, Ark	461	60	30
Newport, Ark	467	60	30
Searcy, Ark	471	60	32
Mena, Ark	486	60	32
Batesville, Ark	496	67	35
Fort Smith, Ark	569	60	42
Sikeston, Mo	530	54	30
Cape Girardeau, Mo	564	56	30
Poplar Bluff, Mo	580	56	30
Heavener, Okla	545	60	39

To the northern Arkansas points the proposed rates are on about the same relative level as those to the Southern Arkansas points, which we allowed to become effective in January. The rates with the 36,000 pound minimum are generally about 17.5 per cent; and those with the 80,000-pound minimum generally about 14.5 per cent, of first class, except those to the southeastern Missouri points, which bear a considerably lower percentage relation, and those to the

Oklahoma points, which bear a considerably higher percentage relation to first class. An amount equal to the surcharge is proposed to be reflected in the proposed rates after the surcharge expires.

[fol. 56] The amounts of the proposed rates are based principally on barge-truck combinations via Camden. Before making their proposal respondents investigated the competitive situation and were advised by commercial interests that the contract-barge rate ordinarily charged from the New Orleans district to Camden was 11.3 cents. They also heard of a 10-cent rate to Calion, quoted by a steamboat operator. They received no authentic information as to what these rates included. Protestant Mississippi Valley Barge Line, which contends that the proposed rates are too low, upon investigation could verify nothing lower by water than a rate of 12 cents and that was merely for towage service, the addition of perhaps at least 5 cents being necessary to cover marine insurance, loading, and unloading. There is a suggestion that the figure of 11.3 cents may have been an arbitrary freight selling basis at Camden, not based on transportation charges. Respondents practically admit that the information they received was not very authentic or complete, but insist that considering all the factors, the probable contract-barge rate was below 18 cents. Protestant urges that it must have been higher. According to information gathered by respondents the contract-barge rate from the New Orleans district to Memphis was 19 cents, for a distance about equal to that from New Orleans to Camden under more favorable operating conditions. The contract-barge rate from the New Orleans district to Cape Girardeau was 25 cents. As we understand it, these rates covered only towage. They may be compared with the contract-barge rate of 20 cents to St. Louis, referred to in the above-considered case. The normal truck rates from the river landings apparently range from about 7 to 25 cents according to distance, although some lower rates may have been made to obtain northbound loads for trucks that had been used for the southbound movement of cotton. We are working somewhat in the dark, but if for illustration, we assume an all-inclusive contract-barge rate of 16 or 17 cents to Camden and an average truck rate of 14 or 15 cents beyond, it appears that the proposed rates with the 80,000-pound minimum, which are generally 30 or 32 cents, on the whole roughly approximate the barge-truck rates. Respondents urge that they should be on about the same level, because the truck rates apply on small quantities from nearby distributing points, whereas the proposed rates would apply on heavy carloads requiring several days for transportation. However, the disadvantages of barge shipment must not be overlooked. As in the above-considered cases, some of the proposed rates, particularly to interior points, are lower than the barge-truck rates, but that is generally due to respondents' observance of the long-and-short-haul rule. For instance, the proposed rate from the New Orleans district to Cape Girardeau, 30 cents, is blanketed southward and inland to Sikeston, Mo. The 30-cent rate as applied to Cape Girardeau may not be any lower than the contract barge rate plus incidental expenses, but applying it to Sikeston leaves nothing to represent the truck haul from Cape Girardeau to Sikeston.

The Mississippi Valley Barge Line concedes that some reductions are necessary to meet contract-barge competition, but it is opposed to any lower basis of rates than 20 per cent of first class. This basis applies throughout Texas and has been adopted by the carriers for general application in the Southwest, but publication of the rates has been held up for some reason pending the decision in this case.

The western trunk-line carriers also urge that the proposed rates are too low. They protest because they are interested in the movement of sugar from beet-sugar manufacturing points in Colorado and Utah to the destination territory in question.

[fol. 57] No reductions are proposed in the standard barge-rail joint rates, because there is no agreement among the parties as to what the rate level or differential should be. The present joint rates are 8 cents lower than the present all-rail rates, the differential representing 20 per cent of the New Orleans-Memphis all-rail rate of 40 cents, without the surcharge, in effect when the joint rates were established. The all-rail rate to Memphis, without the surcharge, is now 25 cents, having been reduced last summer, and on the 20 per cent basis results in a 5-cent differential for the standard barge lines. This latter differential is applied not only on traffic from the New Orleans district to Memphis, but in connection with joint-barge-rail rates from the New Orleans district via Memphis to the Southeast. The Federal Barge Line protests because respondents have not joined it in reduced rates to the destination territory in question, but it takes no definite position as to the level of the proposed rates, leaving that matter to us. This phase of the case is practically disposed of by the report of March 27, 1933, in Ex Parte Nos. 96, 99, and 102, wherein division 4 dealt with the general subject of reflecting the present prescribed barge-rail differential bases in reduced rates and required the continuance of those bases, except where the interested parties may agree upon other differentials. The order therein becomes effective June 1, 1933.

No reductions are proposed to Oklahoma, except to Heavener and a few other points, where they are incident to the Kansas City Southern Railway Company's conformance to the long-and-short-haul rule in meeting the direct lines' rates to Fort Smith, Ark. The Corporation Commission of Oklahoma and Oklahoma City commercial interests protest. They contend that if reductions are made to western Arkansas points without similar reductions to Oklahoma points, particularly those on and east of the north-and-south line of The Atchison, Topeka and Santa Fe Railway Company, the Arkansas points will have an advantage in distributing sugar and Oklahoma points will suffer undue prejudice. Respondents did not investigate the competitive situation in Oklahoma before making their proposal, but protestants' evidence indicates that sugar is trucked from Camden and Calion into that State just as it is into Arkansas.

Respondents have not convinced us that rates as low as those proposed with an 80,000-pound minimum are necessary, but those with the 36,000-pound minimum appear to be near the correct competitive level. The latter are generally only a few cents lower than rates made 20 per cent of first class and since the carriers have already decided upon that basis for general application in the Southwest, we are of the view that it should be given trial before lower rates are published.

We find that the proposed rates have not been justified, but that rates made 20 per cent of first class, without the surcharge, have been justified, which rates may be established on one day's notice provided the same basis is promptly made general in the Southwest. This means, in part, that rates to points in the southern half of Arkansas, originally suspended but allowed to go into effect, must be canceled. Standard barge-rail rates must be promptly established on basis of proper differentials in conformity with the last-cited decision. An order will be entered requiring the cancellation of the suspended schedules, without prejudice to the establishment of the rates herein authorized, and discontinuing this proceeding.

[fol. 58] Fourth-Section Application No. 14080 on Reargument

In Transcontinental Eastbound Sugar, 186 I. C. C. 523, division 2 denied transcontinental lines fourth-section authority to reduce their rates on sugar from San Francisco Bay points to Chicago, Milwaukee, St. Louis, and related points in Illinois, and extreme eastern Iowa and Missouri, without reducing their rates to intermediate points. Upon applicants' petition the case has been reargued.

The facts stated in the previous report should be read as part of this report. Suffice it to say here that the present rate from the California points to Chicago, Milwaukee, St. Louis, and the related points and to intermediate points as far west as central Nevada is an 86-cent blanket rate, generally subject to a minimum of 60,000 pounds. Applicants seek to establish a rate of 62 cents, minimum 80,000 pounds, to Chicago and Milwaukee. Such a rate is considered necessary as a competitive measure because of a water rate of about 56 cents from San Francisco Bay points to Chicago available by the Panama Canal, Hudson River, New York State Barge Canal, and Great Lakes, to which rate, for comparative purposes, the applicants add six cents to represent storage, switching, and other services at destination. Applicants seek to establish a rate of 67.5 cents, minimum 80,000 pounds, to St. Louis for the purpose of meeting a water rate of about that amount available the year round by the Panama Canal and Mississippi River. Recognizing the instability of the water rates, the applicants also seek authority to reduce the proposed rates to all the points from time to time as and to the extent that the water lines' rates may be reduced, but do not propose to go below 48 cents. During the past two years most of the California sugar destined to Chicago and St. Louis has moved at the water rates above mentioned, the traffic via New York, however, being confined to sugar in bags. With the opening of the Illinois Waterway, a water rate of about 50 cents is expected by the applicants this year from the California points to Chicago via New Orleans, and in view of the reductions hereinbefore allowed from New Orleans to St. Louis, there will probably be a substantial reduction in the Mississippi River barge factor of the above 67.5-cent water rate from the California points to St. Louis.

There is no opposition to the application from intermediate points. The eastern and southern carriers, which with the intercoastal steamship lines originally protested it unqualifiedly, have now modified their position to the extent of not opposing reductions that would preserve substantially the present long-standing relationships among origin points, using their own proposed rates from the Atlantic seaboard and Louisiana refining points as a basis. To Chicago, for instance, the usually recognized difference in favor of New Orleans and Baltimore and against the California points is 30 cents. Adding 30 cents to the proposed rate of 39 cents from Baltimore would make the rate from the California points 69 cents. Adding it to the proposed 30-cent rate from New Orleans would make a rate of 60 cents. However, present relationships, in view of the new competitive forces, are no longer worthy of much respect.

The applicants will be granted authority to establish a rate of 65 cents, minimum 80,000 pounds, to Chicago, Milwaukee, St. Louis, and the related points, which rate we find reasonably compensatory, subject to the condition that no rate to points west of Ogden or Salt Lake City, Utah, or Williams or Phoenix, Ariz., shall exceed the rate [fol. 59] established to Chicago, Milwaukee, St. Louis, or the related points. The application is denied so far as it seeks authority to establish rates lower than 65 cents.

An appropriate order will be entered.

Fourth-Section Application No. 14816

By this application, as amended, authority is sought to establish reduced rates on refined sugar, in carloads, from producing points in Colorado, Nebraska, Wyoming, Kansas, Utah, Idaho, Montana, Minnesota, South Dakota, and Iowa to Chicago, Milwaukee, St. Louis, and related points,[2] principally in Illinois territory, and to continue the present rates to intermediate points without observing the long-and-short-haul provision of section 4 of the interstate commerce act.

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[2] In Illinois; southern Wisconsin; the extreme eastern portions of Iowa and Missouri; and western Indiana.

The beet sugar producers in the origin territory, the Public Utilities Commission of Colorado and commercial and agricultural interests in that State support the application. No one opposes the relief sought.

The general basis of rates from the origins here considered to western trunk-line territory is fifth class, minimum 40,000 pounds. Commodity rates, minimum 60,000 pounds, on a much lower basis, where impelled by competition, apply to important consuming centers such as Chicago. The Chicago rate also applies to substantially all points in the intermediate territory east of the Missouri River. The rates to Missouri River cities are slightly lower than fifth class. To intermediate points west thereof they are on the fifth-class basis, subject to the commodity rates to the Missouri River as maxima. The rate from the basic group[3] to representative points in Illinois, St. Louis, and Mississippi River crossings north thereof is 58 cents. The rates to Milwaukee and other points in southern Wisconsin are one or two cents higher. The rates from New York, minimum 60,000 pounds, range from 55 cents to Danville, Ill., and Chicago to 62 cents to the river crossings. The present rates from New Orleans and the proposed rates from that point and eastern refining points to representative points in the destination territory are shown in the above tables.

The reduced rates that applicants wish to establish, herein referred to as proposed rates, are 41 cents, minimum 60,000 pounds, and 32 cents, minimum 80,000 pounds, from the basic group to all of the destination territory. The latter rate reflects a reduction of 26 cents from the present rate, minimum 60,000 pounds. Higher rates related thereto and reflecting similar reductions are proposed from other points on the basis of the following differentials over those shown: From western Colorado, 6.5 cents; from Billings, Chinook, and Sidney, Mont., 5 cents; from Missoula, Mont., 12 cents; and from all points in Idaho and Utah, 13 cents. From McMillan, Idaho, to Chicago for example, the present rate is 71 cents. The proposed rates are 54 and 45 cents, minima 60,000 and 80,000 pounds, respectively. From points that now have rates the same as or lower than those from the basic group the reduced rates from that group would apply as maxima.

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[3] This group embraces producing points in northern and eastern Colorado, western Nebraska, and southeastern Wyoming.

[fol. 60] The average distances from producing points in the basic group to Chicago and Burlington, Iowa, are 976 and 784 miles, respectively. The distances from New Orleans to the same points are 919 and 910 miles, respectively. The distance to Chicago from Brighton, Colo., a point in the basic group near Denver, Colo., over the route of the Union Pacific Railroad Company to Council Bluffs, Iowa, and the Chicago and North Western Railway Company beyond, is 1,028 miles. Departures at intermediate points on this route would occur at stations Hurley, Colo., 81 miles, to which the rate is 33 cents, to Low Moor, Iowa, 891 miles from Brighton, to which the proposed rate is 45 cents. The latter rate would be made by combination of the 32 cent rate to Clinton, Iowa, plus the local fifth-class rate from Clinton. This combination basis, which is typical of the rates that would become applicable to such intermediate points, would project itself westward along the line of the Chicago & North Western as far as Cedar Rapids, Iowa, 82 miles west of Clinton, to which point the rate would be 56 cents. The production of sugar in the origin territory approximates about 16,000,000 bags a year. This sugar comes into competition with sugar produced in the South and East, largely at the Missouri River and in the territory east thereof. The State of Illinois consumed 9,524,158 100-pound bags in 1930 and 8,697,405 bags in 1931. As about 50 per cent of its population is in Chicago and its suburbs, it is assumed that one-half of this sugar was consumed there. The consumption in 1931 in the States of Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and Wisconsin was 15,851,508 bags.

The application is not based upon a loss of traffic already suffered but its purpose is to conserve and safeguard revenue. Sugar carried by roads in the northwestern and central western regions totaled 2,547,295 tons in 1929, 2,624,295 tons in 1930, and 2,602,555 tons in 1931. The total tonnage of sugar originated and handled by the

Union Pacific and the Chicago, Burlington & Quincy, which originate much of the traffic here involved, increased substantially in each successive year during that period.

The origin territory served by applicant carriers is the most important beet-sugar producing area in the United States. As it is a territory of relatively sparse population the important markets for the bulk of the sugar that it produces are in the heavy consuming territory east thereof, particularly that to which the proposed rates would apply. The relationship of the present rates, which have been stabilized over a number of years, would be seriously disrupted if the reductions in the rates proposed from the eastern and southern refining points should be made without corresponding reductions in the rates from these beet-sugar producing points. Applicants therefore deem it imperative that this relationship be maintained, particularly because the producers that they serve must rely entirely upon rail transportation to reach the markets where the bulk of their output is sold.

The application refers to a substantial and increasing movement of sugar by unregulated water carriers from the eastern refineries to Chicago and from the Gulf to St. Louis and Ohio and Mississippi River crossings. The rates of those carriers are substantially lower than those of the rail carriers or the regulated barge lines. The evidence as to such water movements and the movement by truck from the river landings to interior points in the destination territory is similar to that introduced by respondents in the investigation and suspension cases.

[fol. 61] Applicants, like those respondents, feel that they are compelled to meet these new and active forms of competition, according to data obtained by them the movement of sugar from the Atlantic seaboard to Chicago by water in 1931 was 21 per cent of the amount consumed in Illinois in that year. Applicants also look with apprehension upon the proposed all-rail rates from the South to the destination territory, which were published prior to the hearing, as constituting a new element of competition, particularly the rates to interior points in the territory.

Applicants feel impelled to establish the proposed rates. They consider the sugar traffic of such importance that they can not take chances on losing it or of a material curtailment in the tonnage because of the direct and collateral effect upon their revenue, which is derived from the beets and numerous inbound materials to the factories as well as from the sugar tonnage. But they see no necessity for making material reductions in the rates to the intermediate territory, where there is a heavy consumption of sugar. The competition which is met in the destination territory is not present in the same degree in this intermediate territory and applicants point out that if reductions were made in the rates to the latter territory they, as well as the rail carriers from competing sugar refining points, would incur needless losses in revenue. They believe that the losses which they would suffer by such reductions would be so large that they would more than offset the benefit accruing from the proposed rates to the destination territory. In 1931, for example, the movement over the lines of the Union Pacific from Colorado and Utah points to the latter territory was 101,456 tons, yielding gross revenue of $1,202,121. From the same points to the intermediate territory it was 99,293 tons and yielded gross revenue of $1,149,762. The application of the proposed rates as maxima on the latter tonnage would have resulted in a loss in revenue of $479,142. The Chicago, Burlington & Quincy estimated that the revenue reduction on traffic that it handled to the intermediate territory in 1931 would have been $402,000, if it had applied the proposed rates to the destination territory as maxima. The Northern Pacific under similar circumstances would have suffered a revenue reduction on its 1931 tonnage from producing points in Montana to its intermediate territory of $102,000, as compared with a reduction of $18,250 to the destination territory.

The importance of sugar beet production to the welfare and prosperity of Colorado and other sugar beet producing sections in the origin territory; the relative standing of that territory in the production of beet sugar in the United States; and the necessity for marketing the bulk of the sugar there produced in the more populous areas immediately east thereof, including the destination territory, are described at some length in American Sugar Refining Co. v. Chicago, B. & Q. R. Co., 169 I. C. C. 557. The evidence on these points in this case is extensive and goes to emphasize and amplify what was there stated.

Applicants offered a comprehensive study of the cost of handling a carload of sugar, minimum 80,000 pounds, as added traffic in added trains. Assuming that 50 per cent of the average operating expense is applicable to such traffic they estimate this cost on a gross revenue ton basis for a haul of 1,500 miles to be 17 cents per 100 pounds, 9.04 cents per car-mile, 2.26 mills per ton-mile, and $135.64 per car. As the traffic is ordinarily offered a few cars at a time and placed in trains already moving, applicants believe that the added costs are much lower than those shown. The minimum revenue per car under the lowest [fol. 62] of the proposed rates would be $246 under the 41-cent rate, minimum 60,000 pounds, and $256 under the 32-cent rate, minimum 80,000 pounds. The somewhat higher rates, subject to the latter minimum, under the relief authorized, would produce somewhat greater revenue. The evidence warrants the conclusion that the rates which would be established under such authority will be reasonably compensatory.

Applicants will be authorized to establish and maintain from the origin territory to the destinations covered by the appllication rates subject to the 60,000 minimum on the basis described in the application and rates subject to the 80,000 minimum which are 4 cents higher than those described in the application, provided that the higher rates to the intermediate points shall not be increased except as may be authorized by the Commission and shall not exceed the lowest combination of rates subject to the act.

An appropriate order will be entered.

McManamy, Commissioner, concurring in part:

I concur in the findings of the majority in these proceedings except in respect of the granting of fourth-section relief in application No. 14080.

When this matter was before division 2 originally in Transcontinental Eastbound Sugar, 186 I. C. C. 523, applicants proposed to reduce the prevailing carload rate of 84 cents, minimum 60,000 pounds, from San Francisco bay points to Chicago and Milwaukee and related points to 62 cents, and to St. Louis 67.5 cents, subject to a carload minimum weight of 80,000 pounds, and asked for permission to further reduce these rates to as low as 48 cents if further reductions should become necessary to meet the rates of competing water lines. The application was denied at that time and the report indicates this action was taken because the proposed rates were not considered to be reasonably compensatory. Furthermore, the evidence indicated that on the basis of the 1930 movement and distribution it would be necessary for the applicants to obtain practically all of the sugar moving from the Pacific coast to the destination territory to yield as much gross revenue as they obtained from the traffic they had been able to retain to their lines on the basis of the existing rates. The traffic involved is of vital importance to the water carriers and its diversion to the rail lines which was the purpose of the proposed rates would have been a severe blow to those lines. This denial, therefore, was in line with the policy adopted by us in respect to applications for relief from the provisions of section 4 as announced in Transcontinental Rate cases, 1922, 74 I. C. C. 48 (71).

The rate of 65 cents which the majority now proposes to authorize from San Francisco to Chicago and related points will represent a reduction of 21 cents per 100 pounds in the present rate. It is obvious that in order to enable the applicants to obtain even as much revenue under this rate as they obtain under the present rate it would be necessary to increase their present traffic approximately 30 per cent. This can only occur if competing forms of transportation fail to make corresponding reductions an assumption which in my opinion is not warranted. The net result therefore will be a decrease in revenue of all carriers both rail and water.

[fol. 63] According to the latest figures in evidence they handled during 1931, 41 per cent of the sugar from California to these destinations, or in round figures approximately 59,000 tons, while the water lines handled 59 per cent, or approximately 84,000 tons. Had the rate of 65 cents been in effect in 1931 it would have been necessary for the applicants to handle 53 per cent of the tonnage involved in order to secure the same gross revenue actually received under their current rate, and the proportion handled by the water lines necessarily would have been reduced to less than 50 per cent. This would have left the rail lines in no better position, but undoubtedly would have had a serious effect upon the water lines. There can be no escape from the conclusion that to increase their gross revenues alone under the proposed reduced rate it will be necessary for the rail lines to obtain an even greater proportion of the tonnage involved and that of the water lines must also be still further reduced. Under Section 500 of the Transportation Act it is declared to be the policy of Congress to promote, encourage, and develop water transportation and to preserve in full vigor both rail and water transportation. I am unable to subscribe to the view that it would be consistent with this clear mandate from the legislative body to give our approval to the establishment of rates by rail that will be so low as to seriously impair, if in fact it may not be destructive of, water transportation in this case.

Furthermore, I am constrained to dissent from the action of the majority by the limitations placed upon our authority in granting relief from the provisions of section 4. That section expressly provides that we "shall not permit the establishment of any charge to or from the more distant points that is not reasonably compensatory for the service performed." The rate of 65 cents which the majority proposes to authorize for a short-line distance of 2,258 miles and for distances over other routes ranging up to 2,890 miles is 21 cents less than the rate of 84 cents plus the emergency increase, which we prescribed as a maximum reasonable rate for hauls of one half or less of the length of those involved herein. Phoenix Chamber of Commerce v. A., T. & S. F. Ry. Co., 140 I. C. C. 171. Consolidated Southwestern cases, 123 I. C. C. 203. In the latter case we prescribed a rate of 65 cents as a maximum reasonable rate on sugar, carloads minimum weight 60,000 pounds, for distances of approximately 740 miles under transportation conditions generally more favorable than those involved in the transportation of the traffic considered herein. The minimum weight in connection with the 65-cent rate authorized herein is 80,000 pounds. Giving due consideration to this difference, I am unable to concede that a rate which we have prescribed as a maximum reasonable rate for hauls not exceeding approximately 750 miles under equal or more favorable transportation conditions can be considered as a reasonably compensatory rate for hauls of from three to four times that distance. It is my view, therefore, that under the limits imposed upon our authority by express provision of law the relief prayed in this application must be denied.

Lee, Commissioner, concurring in part:

I concur in the conclusions of the majority except with respect to the grant of fourth section relief.

Commissioner Tate dissents to the granting of fourth section relief.

Commissioners Eastman and Miller did not participate in the disposition of these cases.

[fol. 64] Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, Held at Its Office in Washington, D. C., on the 3rd day of July, A.D., 1933

Investigation and Suspension Docket No. 3814

Sugar from Gulf and South Atlantic Points

Investigation and Suspension Docket No. 3829

Sugar from Eastern Points to Central Territory

Investigation and Suspension Docket No. 3837

Sugar from New Orleans to Arkansas, Missouri, and Oklahoma

It appearing, That by orders dated September 30, 1932, and subsequently, the commission entered upon hearings concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said orders, and among other things suspended the operation of said schedules so far as they proposed changes in the rates on sugar, in carloads, until May 1, 1933, and later dates;

It further appearing, That the operation of said schedules in Investigation and Suspension Dockets Nos. 3814 and 3829 has been voluntarily deferred by respondents indefinitely; and in Investigation and Suspension Docket No. 3837 until September 6, 1933;

And it further appearing, That a full investigation of the matters and things involved has been had, and that the commission has, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the order heretofore entered in Investigation and Suspension Docket No. 3814, suspending the operation of said schedules in that proceeding, be, and it is hereby, vacated and set aside so far as it relates to rates based on a minimum of 60,000 pounds.

It is further ordered, That the respondents in Investigation and Suspension Docket No. 3814, be, and they are hereby, notified and required to cancel such of their schedules in that proceeding as name rates based on a minimum of 80,000 pounds, on or before September 5, 1933, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act.

It is further ordered, That the order heretofore entered in Investigation and Suspension Docket No. 3829, suspending the operation of said schedules in that proceeding, be, and it is hereby, vacated and set aside.

[fol. 65] It is further ordered, That the respondents in Investigation and Suspension Docket No. 3837 be, and they are hereby, notified and required to cancel said schedules in that proceeding on or before September 5, 1933, upon notice as aforesaid.

And it is further ordered, That these proceedings be discontinued.

Fourth Section Order No. 11300

By fourth-section applications Nos. 14080 and 14816, files by H. G. Toll and E. B. Boyd, Agents, respectively, carriers parties to Agent H. G. Toll's tariffs I. C. C. Nos. 1226 and 1279 and Agent E. B. Boyd's tariff I. C. C. No. A-2147 respectively ask for authority to establish rates on sugar from and to the territory hereinafter described, without observing the long-and-short-haul provision of section 4 of the interstate commerce act. A hearing having been held and full investigation of the matters and things involved therein having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report and applications are hereby referred to and made a part hereof:

It is ordered, That applicants in No. 14080 be, and they are hereby, authorized to establish and maintain a rate of

65 cents per 100 pounds, for the transportation of sugar, in carloads, minimum weight 80,000 pounds, from San Francisco Bay points to Chicago, Ill., Milwaukee, Wis., St. Louis, Mo., and related points, as set forth in application No. 14080, and to maintain the present higher rates to intermediate points; Provided, That no rate to points west of Ogden or Salt Lake City, Utah, or Williams or Pheonix, Ariz., shall exceed the rate established to Chicago, Ill., Milwaukee, Wis., St. Louis, Mo., or the related points, and shall in no case exceed the lowest combination of rates subject to the interstate commerce act.

It is further ordered, That application in No. 14816 be, and they are hereby, authorized to establish for the transportation of refined sugar, in carloads, from points in Colorado, Nebraska, Wyoming, Kansas, Utah, Idaho, Montana, Minnesota, South Dakota and Iowa to Chicago, Ill., Milwaukee, Wis., St. Louis, Mo., and related points, as described in application No. 14816, rates subject to a minimum carload weight of 60,000 pounds on the basis described in such application, and rates subject to a minimum carload weight of 80,000 pounds which are 4 cents higher than the rates described in the application, and to maintain higher rates to intermediate points; Provided, That the rates to the higher-rated intermediate points shall not be increased except as may be authorized by this Commission and shall in no case exceed the lowest combination of rates subject to the interstate commerce act.

And it is further ordered, That all other and further relief prayed by fourth-section application Nos. 14080 and 14816 be, and the same is hereby, denied.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 66] Substituted Exhibit "C" to Original and Amended Complaint

SUBSTITUTE EXHIBIT "C" TO AMENDED PETITION

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, Held at Its Office in Washington, D. C., on the 18th day of July, A. D., 1933.

Investigation and Suspension Docket No. 3814

Sugar From Gulf and South Atlantic Points

Investigation and Suspension Docket No. 3829

Sugar From Eastern Points to Central Territory

Investigation and Suspension Docket No. 3837

Sugar From New Orleans to Arkansas, Missouri and Oklahoma

Upon further consideration of the matters and things involved in the above-entitled proceedings and of the order entered therein July 3, 1933, and good cause appearing therefor:

It is ordered, That the said order be, and the same is hereby, amended so as to substitute the following for the 1st, 2nd, 3rd and 4th ordering paragraphs thereof:

It is ordered, That the order heretofore entered in Investigation and Suspension Docket No. 3814, suspending the operation of said schedules in that proceeding, be, and it is hereby, vacated and set aside, effective July 29, 1933, so far as it relates to rates based on a minimum of 60,000 pounds: Provided, That supplements changing the effective date of such schedules shall be made effective not earlier than July 29, 1933, by not less than 5 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the respondents in Investigation and Suspension Docket No. 3814 be, and they are hereby notified and required to cancel such of their schedules in that proceeding as name rates based on a minimum of 80,000 pounds, on or before September 5, 1933, but not prior to July 29, 1933, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the order heretofore entered in Investigation and Suspension Docket No. 3829, suspending the operation of said schedules in that proceeding be, and it is hereby, vacated and set aside, effective July 29, 1933: Provided, That supplements changing the effective date of such schedules shall be made effective not earlier than July 29, 1933, by not less than 5 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the respondents in Investigation and Suspension Docket No. 3837 be, and they are hereby, notified and required to cancel said schedules in that proceeding on or before September 5, 1933, but not prior to July 29, 1933, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the respondents in Investigation and Suspension Dockets Nos. 3814 and 3837 be, and they are hereby, authorized to establish in lieu of the rates contained in the schedules required to be canceled by the preceeding paragraphs hereof, the rates approved in the report referred to and made a part hereof, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, but not earlier than July 29, 1933.

By the Commission, Division 2.

George B. McGinty. (Seal.)

[fol. 67] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA TO PETITION AND AMENDED PETITION—Filed Aug. 15, 1933

First Defense

United States, one of the defendants in the above-entitled cause, for its First Defense to the petition and amended petition (hereinafter called the "petition") filed therein against it says:

(1) Petitioner is without legal standing to maintain this suit under Urgent Deficiencies Act (38 Stat. 219; U. S. Code, Tit. 28, Secs. 41-48, inclusive), for the reason, among others, that it has no legal interest in the subject matter of the orders of the Interstate Commerce Commission which it seeks to enjoin and annul.

(2) The petition is without equity on its face, and its allegations disclose no ground sufficient to entitle petitioner to the injunctive processes of this Court.

(3) The petition discloses on its face that there is nothing in the orders of the Interstate Commerce Commission [fol. 68] to which the injunctive processes of this Court can attach, for the reason that said orders merely permit certain tariffs and schedules of rates voluntarily filed with the Commission by numerous common carriers by railroad to become effective, which rates the Commission has found upon evidence to be justified, hence, there is no requirement in the orders which is susceptible of enjoinment.

Second Defense

United States for its Second Defense to the petition and amended petition (hereinafter referred to as the "petition") filed therein against it answers and says:

I

United States admits the allegations of the first two paragraphs, and the first subdivision of paragraph 1 of the petition; but disclaims knowledge of the allegation contained in the second subdivision of said paragraph 1 concerning the reason why petitioner undertook to engage in its present business.

II

United States admits the allegations of paragraphs 2 and 3 of the petition, except that it denies that any specific duty is imposed upon the Interstate Commerce Commission by Section 500 of the Transportation Act, 1920.

III

United States, for answer to paragraph 4 of the petition, admits the allegation contained in the first sentence thereof that on July 3, 1933, and July 21, 1933, the Commission made and rendered its reports and orders, and supplemental reports and orders, in a proceeding entitled "Investigation and Suspension Docket No. 3814" and asso- [fol. 69] ciated cases, as stated on the first page of said report, which is annexed to the petition as Exhibit B. But United States denies the remaining allegations of said paragraph 4, and denies that they contain a fair, accurate or complete statement of the statements, findings and conclusions of the Commission in its said report, and for a full, complete and accurate statement thereof United States respectfully refers the Court to the full text thereof, annexed as Exhibit B to the petition.

IV

United States denies the allegations contained in paragraphs 5, 6 and 7 of the petition, and denies that the allegations of said paragraphs contain a fair, true, complete or accurate statement of the findings and statements contained in the Commission's report, and respectfully refers the Court to the full text thereof, annexed as Exhibit B to the petition; and, further answering the allegations of said paragraph, United States alleges that they are purely argumentative, speculative and based on petitioner's own construction of and deductions from the Commission's report and orders.

V

United States denies the allegations contained in paragraph 8 of the petition, except that it admits that pursuant to the so-called Denison Act the Commission has heretofore in certain proceedings before it prescribed rates for barge-rail application, upon stated differentials under or lower than all-rail rates for similar traffic.

[fol. 70]

VI

United States admits that Section 500, Transportation Act, 1920, contains the provision quoted in paragraph 9 of the petition, and denies the remaining allegations of said paragraph.

VII

United States denies the allegations contained in paragraph 10 of the petition.

VIII

United States denies the conclusions, matters and things alleged in paragraph 11 of the petition, and alleges that said allegations are argumentative and speculative; that the matters therein mentioned were considered by the Commission, and that said matters are not within the power of this Court to consider.

IX

United States admits the allegations contained in paragraph 12 of the petition.

X

United States denies the allegations contained in paragraph 13, and denies that said orders of the Commission are unlawful or void for any reason therein alleged; except that it admits that Congress enacted the so-called "Inland Waterways Corporation Act," 43 Stat. 360 and 45 Stat. 978, to the full text of which the Court is respectfully referred for a complete and accurate statement concerning the provisions thereof.

XI

United States denies the allegations contained in paragraphs 14, 15, 16 and 17 of the petition, and denies that said orders of the Commission are unlawful or void for [fol. 71] any reasons set forth therein, or for any other reason.

XII

United States denies the allegations contained in paragraph 18 of the petition, and denies that the orders of the Commission are unlawful or void for any reason set forth in said paragraph, or for any other reason; and particularly denies the allegation in said paragraph 18 that said orders will result in irreparable injury and damage to petitioner, and denies that they will result in any legal injury or damage to petitioner.

XIII

United States, answering paragraph 19 of the petition (as amended) admits that petitioner filed with the Commission the motion described in said paragraph, and admits that said motion (which is annexed before Exhibit A to the amended petition) contained the allegations substantially as set forth in the subdivisions of said paragraph 19; and admits that the Commission denied said motion; but United States denies the remaining allegations of said paragraph 19, and particularly denies that the action of the Commission in denying said motion and refusing to reopen and rehear the proceedings was unreasonable, arbitrary, in abuse of the Commission's discretion or otherwise unlawful; and further denies that the Commission's said orders are unlawful or void by virtue of its refusal to grant said rehearing, or for any other reason alleged or suggested in said paragraph 19.

XIV

United States denies each and every allegation contained [fol. 72] in the first subdivision of paragraph 20 of the petition (as amended), but admits the jurisdictional facts alleged in the second subdivision of said paragraph 20.

XV

Except as herein expressly admitted, United States denies each and every allegation made and contained in the petition, and in each of the several paragraphs thereof.

Further and affirmatively answering the petition, United States admits and alleges that the Interstate Commerce Commission made and rendered the report and the orders sought to be enjoined, that they were made and entered after full hearing of voluminous testimony, that said orders and the conclusions and findings upon which they are based are fully and adequately supported and justified by the evidence, and that in making and entering said orders the Commission acted fully within its statutory authority and did not act arbitrarily, unreasonably or otherwise unlawfully.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and that said petition be dismissed with costs to the petitioner, and that it have such other and further orders, decrees, or relief as may be just and proper.

(Sig.) Elmer B. Collins, Special Assistant to the Attorney General; Louis H. Breuer, United States Attorney; Harold M. Stephens, Assistant Attorney General.

[fol. 73] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO AMENDED PETITION—Filed Aug. 15, 1933

The Interstate Commerce Commission, one of the defendants herein, hereinafter referred to as the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's amended petition contained, for answer thereto, or unto so much or such parts thereof as it is advised it is material for it to answer, answers and says:

I

Answering the introductory paragraphs and paragraph numbered 1, the Commission admits for the purpose of this suit that the allegations therein contained are true, except that it is without knowledge as to the truth of the allegations in the second subparagraph of paragraph 1 of the reason which prompted the petitioner to undertake its operation and, therefore, if it be material, neither admits nor denies said allegation. Further, it alleges that a copy of [fol. 75] the order of July 18, 1933, is not attached to the petition as alleged.

II

Answering paragraphs numbered 2 and 3, the Commission admits the allegations therein contained, except that with respect to the allegation in paragraph 3 as to its duties under the Acts of Congress specified, it respectfully refers the Court to said acts, as best defining and determining its duties and functions.

III

Answering paragraphs numbered 4 to 18, inclusive, the Commission admits and alleges that it made and entered its orders dated July 3, 1933, and July 18, 1933, referred to in paragraph 4 of the amended petition in proceedings then pending before it entitled "Investigation and Suspension Docket No. 3814, Sugar from Gulf and South Atlantic Points, Sugar Cases of 1933." That said proceedings were initiated by the Commission upon complaint, without formal pleading, for the purpose of determining the lawfulness of the rates, charges, regulations and practices stated in certain schedules contained in specified tariffs theretofore filed with the said Commission by certain common carriers by railroad subject to the Interstate Commerce Act; that in said proceedings the said carriers parties to said schedules were made parties respondent; that full hearings were had and thereafter the Commission made and entered and served upon all parties to the said proceedings its report of July 3, 1933, and its orders of July 3, 1933, and of July 18, 1933. A copy of said report and of each of said orders are attached to this answer as Exhibits A and B and made a part hereof, and the Commis-[fol. 76] sion respectfully refers the Court to the same for information concerning its findings and requirements in the premises.

The Commission alleges that in said proceedings and prior to the making entering and serving of said report and orders, the parties thereto, including the petitioners herein, were, and each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearing a large volume of testimony was taken and other evidence bearing upon the matters covered in said report and orders were submitted to the Commission for consideration, including testimony and evidence submitted on behalf of the petitioner herein; that at said hearing and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of the parties, including the particular questions raised by petitioner in this suit, whereupon the Commission determined said matters and entered and served upon all parties to said proceedings, including the petitioner herein, its said report and orders; that said report and orders included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions on which the said orders are based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid; that in making said report it considered and weighed carefully, [fol. 77] in the light of its own knowledge and experience each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings, including the matters covered by the allegations of the amended petition herein.

The Commission further alleges that said orders of July 3, 1933, and July 18, 1933, were not made or entered either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making such orders the Commission did not exceed the authority which had been duly conferred upon it, did not ignore or fail or refuse to discharge any duty imposed upon it by any law applicable, did not fail or refuse to give effect to, and did not act or proceed in conflict with any law or mandate of Congress; and the Commission denies each and all the allegations to the contrary contained in the amended petition herein, and it specifically denies the allegations of paragraph numbered 9 of the amended petition that it failed and refused to give effect to the provisions of Section 500 of the Transportation Act, 1920.

Further answering the first subparagraph of paragraph numbered 8 of the amended petition, the Commission admits that in certain proceedings heretofore determined by it, namely Ex Parte No. 96, No. 99 and No. 102 (not No. 103 as specified in the amended petition), it prescribed differentials for barge-rail and rail-barge-rail movement of traffic, generally 20 per cent less than the all-rail rate applicable between the ports served by the barge line involved, but it denies that in its report and orders in the proceedings involved in this suit, it did not give considera- [fol. 78] tion to the situation of the petitioner and the effect of said orders upon its operations.

Answering the second subparagraph of said paragraph numbered 8, the Commission alleges that the averments thereof as to the action of the rail carriers are immaterial to the issues presented by this suit, namely the validity of the orders of the Commission.

Further answering paragraph numbered 10, the Commission specifically denies the allegations contained in the first subparagraph thereof that the decision and orders of the Commission are without evidence to support them or are beyond the record and that there is no testimony in the record to sustain the finding of the Commission with respect to the cost of barge-line service, and that the Commission erroneously and unlawfully determined said cost.

Answering the second subparagraph of said paragraph 10, the Commission alleges that the allegations therein are argumentative; however, it denies that it made any error or adopted any improper method in arriving at its conclusion and finding that the rates or the level of the rates specified in said subparagraph are compensatory.

Further answering paragraph 11, the Commission alleges that the allegations therein contained consist of arguments and conclusions as to intent and purposes of the rail carriers in proposing the rates considered by the Commission in the proceedings here involved and as to the effect which the petitioner assumes will result from the orders of the Commission entered in said proceedings; that to such allegations it is not required to make answer and it further [fol. 79] alleges that such allegations are immaterial to the issues presented in and by this suit.

Further answering paragraph numbered 12 and the first subparagraph of paragraph numbered 13, the Commission denies that its decision and its orders are in conflict with the provisions of the so-called Anti-Trust Act specified in said paragraph 12.

Further answering the second, third and fourth subparagraphs of paragraph numbered 13, the Commission admits that the Inland Waterways Corporation Act, as amended, the statute referred to in the second subparagraph, contained provisions substantially as set forth and that petitioner, as averred in the third subparagraph, obtained from the Commission a certificate of public convenience and necessity as authorized by said statute; the Commission, however, denies that its decision, report or orders in the proceedings here involved has the effect alleged or operates as a withdrawal or annulment of said certificate; the Commission alleges that that portion of Section 15a of the Interstate Commerce Act, referred to in the fourth subparagraph, has been amended by Section 205 of Title II of the Act of June 16, 1933, Public No. 68, the Emergency Railroad Transportation Act, 1933, and a different rule of rate making has been thereby substituted. It therefore submits that the averments of this subparagraph are immaterial and irrelevant, but the Commission denies that the rates authorized will not be compensatory and alleges that it expressly found that they would be; further, the Commission alleges that the petitioner has not the interest or standing or capacity to raise any question of the insufficiency of revenue accruing to the rail carriers under [fol. 80] the rates proposed by them and authorized by the Commission.

Further answering paragraphs numbered 15, 16 and 17 of the amended petition, the Commission denies that its orders referred to therein result in violation of Sections 2 and 3 of the Interstate Commerce Act; on the contrary it alleges that its orders were authorized by, and were consistent with, the provisions of Section 4 of the Act and with the authority vested in it by said section.

Further answering paragraph numbered 18 of the amended petition, the Commission denies the effect of its orders or the putting into effect of the rates authorized or found justified by the Commission, will be to cause irreparable damage and legal injury to petitioner for which it may have remedy in the courts; it further denies that the effect of the orders of the Commission is or will be to take or confiscate petitioner's property. The Commission further alleges that the said tariffs and rates became operative and went into effect on July 29, 1933, as to those rates in which a minimum of 60,000 pounds was specified, and on July 31, 1933, as to those based on a minimum of 80,000 pounds.

IV

Answering paragraph numbered 19 of the amended petition, the Commission admits the filing by the petitioner of the motion for rehearing, reargument and modification specified in said paragraph and refers the Court to the copy thereof filed with the amended petition for full and precise information as to the statements and showing made therein. The Commission admits that it overruled said motion by order dated July 31, 1933, not August 3, 1933, [fol. 81] as stated in the amended petition.

The Commission denies that its action in overruling said motion was a denial of any right of petitioner and denies that its action was unlawful or invalid or constituted a denial of a fair hearing or constituted arbitrary action. On the contrary it alleges that its action was a proper and valid exercise of its administrative authority.

Further answering said paragraph, the Commission alleges that the petitioner was guilty of laches in the filing of the said motion, particularly in so far as it related to changed conditions, in that it failed to file the same and to call the Commission's attention to said alleged changed conditions until after the report and orders of the Commission involved herein were made, entered and issued; that having failed so to do, and having thus speculated upon the character and effect of the report and orders which would be issued, it cannot be heard to complain of the Commission's action on said motion.

In further answer to said paragraph, the Commission alleges that said motion was not received by it or filed with it until July 28, 1933; that prior thereto, to-wit, on July 27, 1933, the petitioner filed in this Court its petition in this cause seeking a decree setting aside and annulling said orders of the Commission; that in and by the institution of this suit as aforesaid, the petitioner elected to proceed in Court to obtain such relief as it deemed itself entitled to and it is thereby estopped from now asserting that the Commission ought to have allowed or granted said motion. Further, the Commission alleges that its action in overrul- [fol. 82] ing the said motion was fully justified by reason of the institution of this suit by petitioner, in addition to the other reasons already set forth.

Further answering the said paragraph, the Commission admits that it refused to change or extend the effective date for the rates involved, but alleges that said refusal was within its administrative discretion and was not arbitrary and violated no right of petitioner.

Answering the last subparagraph of said paragraph numbered 19, the Commission denies that petitioner used due diligence to prevent the said rates going into effect.

V

Answering the first subparagraph of paragraph numbered 20 of the amended petition, the Commission denies that its orders, or either of them, are erroneous, unlawful, invalid, inconsistent, arbitrary or without substantial evidence to support them, or either of them, or in violation of any law, for the reasons or in the particulars specified in said paragraphs, or for any other reasons or in any other particulars whatsoever.

Answering the second subparagraph of said paragraph 20, the Commission admits that the venue of this suit is properly laid.

VI

The ~~Commission~~ further alleges, as shown in its said report, there were considered in said report other proceedings as specified therein; that said orders of July 3, 1933, and July 18, 1933, were directed to said other proceedings as well as to the proceeding designated "Investigation [fol. 83] and Suspension Docket No. 3814;" that from the main allegations of the amended petition it would appear that petitioner attacks and seeks relief in respect of the orders in so far as they relate ~~to~~ Investigation and Suspension Docket No. 3814, but from other allegations the Commission is uncertain whether petitioner complains of and seeks relief in respect to said other proceedings and of the part or parts of the orders which were directed to these proceedings, but, nevertheless, the Commission makes the same averments and allegations and denials in respect to each of these proceedings and of the part or parts of the orders affecting them as is made with respect to proceeding No. 3814, and of the part or parts of the order affecting said proceeding, and it further particularly and by reference as if fully set forth here, makes applicable to said other proceedings and other part or parts of said orders the allegations, averments and contents of paragraph III of this answer, in respect of the granting of a full hearing, the participation of petitioner therein, the regularity of the proceedings before the Commission, the conformity to and application by the Commission of the law relating to the subject matters, and the existence of substantial evidence to support the findings of the Commission.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the amended petition in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in its said report of July 3, 1933, and its orders of July 3, 1933, and July 18, 1933, which re-[fol. 84] port and orders are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and it hereby prays that said amended petition be dismissed.

VII

For a further and separate defense to said amended petition, the Commission alleges that the petitioner is without interest, standing or capacity to institute or maintain this suit, for that the orders of the Commission complained of by petitioner neither required nor compel any action by the petitioner; that said orders authorize and find justified all rail rates proposed by rail carriers; that said rates do not apply to traffic over petitioner's lines, and that petitioner's complaint is as to an alleged impairment of its status as a competitor of the rail carriers; that such impairment if it be established, does not and would not constitute a legal injury or one which would enable or entitle it to bring this suit.

Wherefore, the Commission moves the Court to dismiss said amended petition.

Interstate Commerce Commission, Daniel W. Knowlton, Chief Counsel; H. L. Underwood, Attorney.

[fol. 85] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

[fol. 86] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF THE ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY; CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY AND NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY—Filed Aug. 15, 1933

To the Honorable Judges of the Said Court:

In accordance with the provisions of Section 212 of the Judicial Code (U. S. C. A. Title 28, Sec. 47, Subd. (27), Note), we hereby enter the appearance of the Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company and New Orleans and Northeastern Railroad Company, as interveners, and of ourselves as their counsel in the above entitled cause, each one of which railroad companies was a party in interest to the proceeding before the Interstate Commerce Commission, known as I. & S. Docket No. 3814, Sugar From Gulf and South Atlantic Points.

(Sgd.) H. L. Walker, Elmer A. Smith.

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENERS ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY; CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY AND NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY, TO THE AMENDED COMPLAINT—Filed Aug. 15, 1933

The above named interveners in the above-entitled suit, reserving to themselves and to each of them all manner of benefit and advantage of exception to the many errors and insufficiencies in the amended petition, for answer thereunto, or unto so much or such parts thereof as they are advised it is material for them to answer state:

I

Interveners admit the allegations of the second paragraph of the amended petition and admit that the Interstate Commerce Commission made a report and entered orders as shown in Exhibits "B" and "C" attached to the amended complaint.

II

Interveners admit the allegations contained in the first paragraph of Section 1, the allegations contained in Section 2, and the allegations contained in Section 3, except that interveners deny that the Interstate Commerce Commission is specifically charged with the administration and enforcement of Section 500 of the Transportation Act of 1920.

III

Interveners in answer to the allegations in Section 4 admit that the Interstate Commerce Commission on July 3, [fol. 88] 1933 and on July 18, 1933 entered orders in a proceeding known as I. & S. Docket No. 3814 and associated cases and that in said orders the Commission referred to and made a part thereof its report in said cases, and state that copies of said orders and report are attached to the amended petition and marked Exhibits "B" and "C". Interveners refer to the said report as to what the Commission therein said and found.

IV

Interveners deny each and all of the allegations contained in Section 5 of the amended petition.

V

Interveners in answer to the allegations contained in Sections 6 and 7 state that the report of the Interstate Commerce Commission attached to the amended complaint and marked Exhibit "B" shows what findings were made by the Commission and what rates the Commission found justified.

VI

Interveners deny that the Commission approved a rate for all-rail service from 1 cent to 11 cents lower than the total cost [illegible] the sugar refiner of a barge-truck movement as alleged in Section 7.

VII

Interveners deny that the Commission has not given effect or consideration to any damage and detriment that may accrue to the barge line movement of sugar by reason of the rates which the Commission found the carriers had justified in the said proceeding known as I. & S. Docket No. 3814, and state that the Mississippi Valley Barge Line Company has no vested right to the traffic in sugar or in any other traffic.

Interveners deny that they have entered upon a policy to eliminate water transportation as averred in the second paragraph of Section 8 and state that such reductions as they have made in the rates on the commodities enumerated [fol. 89] in said second paragraph have been made to meet the competition of other agencies of transportation, including barge lines and trucks, and to prevent the total destruction and loss of interveners' traffic.

Interveners state that they have a right under the law to reduce their rates to meet the competition of other agencies of transportation provided only that such reduced rates do not violate the Interstate Commerce Act. They further state that such reduced rates as they have made to meet the competition of other agencies of transportation are not in violation of the Interstate Commerce Act.

VIII

Interveners admit that Section 500 of the Transportation Act of 1920 reads as set out in Section 9, but they deny each and all of the other allegations contained in said section.

IX

Interveners deny that the said report and order of the Commission is without evidence to support the same and beyond the record in the respects stated in the first paragraph of Section 10 or in any other respects, and deny that the Commission erred as stated in said Section 10 or that the result reached by it is erroneous and unlawful, and deny the allegation that there is no testimony in the record to justify the Commission's findings.

They further deny that the Commission in making the comparison referred to in the second paragraph of said Section 10 gave consideration to the system costs of one rail line alone and deny that the finding of the Commission respecting the compensatory character of the rates which the Commission found justified was arrived at by erroneous calculations.

Further answering Section 10 these interveners state that the report and order of the Commission are supported and sustained by the evidence before the Commission in said proceeding known as I. & S. Docket No. 3814.

[fol. 90]

X

Interveners admit the allegation in the first paragraph of Section 11 that they proposed a rate of 28 cents from New Orleans, Louisiana, to St. Louis, Missouri, to enable them to meet the competitive situation incident to water transportation.

Interveners deny that at the time of the filing of the tariffs and at the present time the going rate incident to port-to-port movement by certificated barge lines from New Orleans, Louisiana, to St. Louis, Missouri, was from 37 cents to 42 cents per 100 pounds and state that according to their best information one or more certificated barge lines transported sugar in substantial volume at rates substantially less than the said rates.

Interveners deny that their purpose in proposing reduced rates was to cripple or eliminate certificated barge lines operating on the Mississippi and Ohio rivers and their tributaries. Interveners state that their purpose in proposing to reduce rates was to give their all-rail routes from New Orleans, Louisiana, to points in the North an equality of opportunity with competing water routes and to enable interveners to handle by their all-rail routes from New Orleans, Louisiana, a fair share of the sugar traffic originating at that point, that the adjustment of rates that had been in effect had denied to the all-rail routes of interveners an equality of opportunity with competing routes and had resulted in the diversion from the all-rail routes of petitioners to competing barge and truck routes of an enormous tonnage in sugar, that as found by the Interstate Commerce Commission in its report in I. & S. Docket No. 3814, the rail lines operating out of New Orleans, Louisiana, to points in the North are hauling practically no sugar, and that in 1932 the barge movement of sugar amounted to over 500,000 tons or about ten times as much as moved all rail from Louisiana points to the same territory.

[fol. 91] Further answering interveners deny the allegation in the second paragraph of Section 11 that the rate to St. Louis, Missouri, is typical of the character of rates that were proposed by them in said I. & S. Docket No. 3814 and of the particular intent and purpose that the rail carriers had in proposing said rates.

Interveners deny that the Commission has allowed the rail carriers to carry out and put into execution and effect their purpose of eliminating certificated barge line movements.

Further answering interveners deny the allegation in the third paragraph of Section 11 that the contract barge line operators and operations have disappeared from the picture since the hearing before the Commission, with the exception of one particular line, and deny that the rates approved by the Commission will be to meet alone a competitive situation as presented by the certificated barge lines, including that of the barge line of petitioner, and deny that the rates approved or designated to St. Louis, Missouri, could have but one result and that is the elimination of the entire sugar tonnage from the water-borne service.

Further answering interveners deny that the Commission by its order is permitting and allowing a positive effort on the part of rail carriers to eliminate water competition, but aver that the Commission has found certain rates not unlawful which in the judgment of interveners will give their all-rail routes an equality of opportunity with competing water routes, an equality which the adjustment of rates formerly in effect denied to interveners and will give interveners a fair share of the sugar traffic, and that there is no provision in the law that support- the contention of petitioner that the barge lines are as a matter of right entitled to transport substantially all the sugar traffic from New Orleans, Louisiana, to the exclusion of the rail carriers.

[fol. 92]

XI

Interveners in answer to Section 12 state that the statutes therein referred to declare what is unlawful under said statutes.

XII

Interveners deny each and all the allegations in the first paragraph of Section 13 and particularly deny that the rates proposed and designated by the Commission will restrain commerce between the various States or tend thereto, deny that the Commission in its report recognizes the fact that the rates found justified by the Commission will have the effect of restraining commerce between the various States or will tend thereto, and deny that an attorney for one of the rail carriers at the oral argument in I. & S. Docket 3814 stated to the Commission that it was the intent and purpose of the proposed rates to cripple or entirely eliminate water transportation, and deny that this is the result of the rates found justified by the Commission.

Further answering interveners deny that the report of the Commission is in direct conflict with statutory enactment.

Interveners in answer to the second paragraph of Section 13 state that the act of Congress therein cited shows what provisions it contains.

Interveners in answer to the third paragraph of Section 13 admit that petitioner obtained a certificate of public convenience and necessity from the Interstate Commerce Commission under the order of said Commission of July 11, 1930, issued in a proceeding known as Ex Parte No. 99, Application of Mississippi Valley Barge Line Company, 167 I. C. C. 41. But interveners state that the said certificate did not render petitioner and its operations immune from competition or make it unlawful for a rail carrier to compete with petitioner.

[fol. 93] Interveners further deny that the effect of the order of the Commission in I. & S. Docket No. 3814 and associated cases is to remove the petitioner as a water carrier from the Mississippi River and its tributaries and to withdraw and cancel for all practical purposes the certificate issued by the said Commission in the said proceeding.

Further answering interveners deny that under the decision of the Commission in I. & S. Docket No. 3814 and associated cases the Commission admits that it is improbable that the rail carriers by the rates proposed or designated can or will recapture the sugar tonnage in sufficient amount to compensate for the losses they will sustain under the present movement and under the present rates. Interveners state that their purpose in proposing the rates on sugar considered by the Commission in I. & S. Docket No. 3814 was not only to regain some part of the sugar traffic that they had lost in the past few years to competing agencies of transportation because of the lack of any fair competitive relationship between their all-rail rates and the rates of their competitors, but to prevent any further losses in their traffic, that as found by the Commission in the report the interveners were willing to make these reductions rather than run the risk of further losses in their sugar traffic which the continued maintenance of existing rates might entail.

Interveners further answering the fourth paragraph of Section 13 state that the act of Congress therein referred to, Section 15a of the Interstate Commerce Act, was amended by the act of Congress entitled "Emergency Railroad Transportation Act, 1933," approved June 16, 1933.

Interveners deny that the report of the Commission in I. & S. Docket No. 3814 is contrary to and in violation of the express mandate of Congress that relates to matters within the jurisdiction of the Interstate Commerce Commission.

[fol. 94]

XIV

Interveners in answer to the allegations contained in Section 14 state that the report of the Commission in I. & S. Docket No. 3814 and associated cases shows what the Commission decided and determined in connection therewith and the orders that it entered, the report and orders being attached to and made a part of the amended petition.

XV

Interveners deny the allegation contained in Section 15 that the order of the Commission results in discrimination and in undue preference and prejudice in violation of Sections 2 and 3 of the Interstate Commerce Act, and deny that the Commission in its report recognizes these violations of the Act and makes no defense for said situation.

XVI

Interveners deny that the disparity between the rates referrred to in Section 16 creates violations of the Interstate Commerce Act and deny the allegation in said section that for the reasons stated in said section the order of the Commission results in a violation of Sections 2 and 3 of the Interstate Commerce Act and is therefore illegal, unlawful and void.

Interveners further answering Sections 14, 15 and 16 state that not all discriminations and preferences are unjust and unlawful but only those that are undue, that whether in any case the discrimination or preference is undue is a question of fact, that the duty of determining this question of fact in any case is imposed by the Interstate Commerce Act upon the Interstate Commerce Commission and that said Commission in its report in I. & S. Docket No. 3814 found that there was no unjust discrimination or undue preference in the rates which it found that the rail carriers had justified.

[fol. 95]

XVII

Interveners deny that the rates which the Interstate Commerce Commission found the rail carriers had justified will result in a violation of the fourth section of the Interstate Commerce Act as alleged in Section 17, and in further answer to said section state that such departures from the fourth section as exist in the rates from New Orleans, Louisiana, which the Commission found the rail carriers had justified, are all protected by Fourth Section Order No. 7542, issued by said Commission.

XVIII

Interveners deny the allegation in the first paragraph of Section 18 ~~that~~ the rates which the Interstate Commerce Commission found the rail carriers had justified will result in the crippling or entire elimination of petitioners' business.

Interveners further answering said first paragraph of said Section 18 state that it is their expectation and hope that the rates which the Commission found justified will give interveners a fair share of the sugar traffic originating in New Orleans, Louisiana, and that if the rail lines, including the lines of interveners serving New Orleans, Louisiana, obtain a fair share of the sugar traffic originated at that point, it will necessarily result in the diversion from competing barge lines, including the petitioner, or some part of the sugar traffic that they have been handling, but that as found by the Commission in its report in I. & S. Docket No. 3814, the rail carriers reaching New Orleans, Louisiana, having been handling by their all-rail routes from New Orleans, Louisiana, only about one-tenth of the volume of sugar transported from New Orleans, Louisiana, by the barge lines, that this division of the sugar tonnage does not reflect a fair division of the tonnage and does not give the all-rail routes a fair share of the sugar traffic, and that [fol. 96] the rail carriers, including interveners, have the right under the Interstate Commerce Act to establish rates that are in conformity with that Act and that will give them a fair share of the traffic.

Interveners in answer to the second paragraph of Section 18 state that the report and order of the Commission in I. & S. Docket No. 3814, Exhibits "B" and "C" attached to the amended petition, show just what findings the Commission made.

Interveners deny that the rates which the Commission therein found justified will result in damage and in irreparable injury to petitioner.

Interveners deny that the rates found justified by the Commission in its order will produce the result as stated in Paragraph 3 of Section 18.

Further answering the third paragraph of said section interveners state that the order of the Commission does not require petitioner to accept and transport sugar, that it does not require petitioner to establish its port-to-port rates or its joint rates with rail carriers on a fixed or definite relationship with the all-rail rates which the Commission found justified in its report in I. & S. Docket No. 3814.

Interveners further state that the petitioner has no legal right to complain of the all-rail rates which are lawful rates under the standards laid down by the Interstate Commerce Act, and that all-rail rates which are lawful rates under such standards cannot be said as a matter of law to confiscate the property of petitioner.

XIX

Interveners admit in answer to the allegations contained in Section 19 that petitioner filed with the Interstate Commerce Commission a Motion for Rehearing, a copy of which [fol. 97] Motion is attached to the amended petition, and that said Motion for Rehearing was overruled by the Commission.

Interveners deny that the competition of contract barge lines has entirely disappeared since the hearing in I. & S. Docket No. 3814, with the exception of one particular line, deny that the particular competition which was described by interveners at the hearing in I. & S. Docket No. 3814 was entirely changed and that the record before the Commission is stale, deny that the particular costs testified to before the Commission with respect to water-borne tonnage and the costs at the present time are entirely different, and deny that the denial by the Commission of petitioner's Motion for Rehearing was a denial of a right guaranteed by law.

Further answering Section 19 interveners deny that the National Recovery Act has resulted in any change in conditions from those that existed at the time I. & S. Docket No. 3814 was heard before the Commission, deny that there has been any co-ordination of various forms of transportation, deny that the rates found justified by the Commission in I. & S. Docket No. 3814, will result in a loss to the rail carriers of the United States in the approximate sum of $10,000,000.00 per year, and state that the allegations in the first and second paragraphs of said Section 19 with respect to the National Industrial Recovery Act deal solely with conditions which may or may not exist at some future time.

Further answering Section 19 interveners deny that the only transportation agencies that have been handling substantial tonnages of sugar from the Gulf ports to St. Louis, Missouri, are the certificated barge lines, and deny that the rates charged by all the certificated barge lines on port-to-port movements from New Orleans, Louisiana, to St. Louis, Missouri, are from 37 to 42 cents; but state that the rates charged by at least one line range from 20 to 24 cents.

[fol. 98] Interveners deny that the particular rates found justified by the Interstate Commerce Commission are far below the out-of-pocket cost incident to the movement of sugar by water from the Gulf to Ohio and Mississippi river ports, and deny that under the rates designated by the Commission water transportation cannot continue as a profitable venture.

Interveners deny that a radically different situation had supervened since the date of the hearing in I. & S. Docket No. 3814 before the Commission, and deny that there was any change in conditions that made it mandatory upon the Commission to grant petitioner's Motion for Rehearing, and deny that the action of the Commission in denying petitioner's Motion for Rehearing was unlawful and that the order of the Commission is invalid.

XX

Interveners deny each and all of the allegations contained in Section 20.

XXI

Interveners further answering the amended petition herein allege that the findings and conclusions of the Interstate Commerce Commission were and are and that each of them was and is fully supported and justified by the evidence before the Commission and allege that the said order was not made or entered by the Commission either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it, that the order is not in violation of any act of Congress and that in making said order the Commission did not exceed the authority which had been duly conferred upon it by the Interstate Commerce Act, or exercise that authority in an unreasonable manner.

XXII

Interveners further answering the amended petition allege that the order of the Commission in I. & S. Docket No. 3814, averred by petitioner to be void, subjected pe-
[fol. 99] titioner to no legal injury, that petitioner has no legal right or interest that has been or will be injuriously affected by the said order, and the petitioner, therefore, has no right to institute and maintain this suit.

XXIII

Interveners further answering the amended petition allege that the order of the Commission is not such an order as may be judicially reviewed by any court and that for the court to take jurisdiction of this proceeding would be tantamount to usurpation by the court of the functions of the Commission.

XXIV

Interveners further answering the amended petition allege that the order of the Commisison in I. & S. Docket No. 3814 required interveners to publish no rates whatever, that the order required interveners to cancel proposed rates based upon a minimum weight of 80,000 pounds which had never taken effect, that the cause has therefore become moot and that a judgment in favor of petitioner would be futile, that if the Commission's order were set aside the rail carriers would still be free to publish rates at least no lower than those found justified by the Commission in its report in I. & S. Docket No. 3814 and associated cases, subject, of course, to the power of the Commission under Section 15 (7) of the Interstate Commerce Act to suspend those rates.

Interveners deny that petitioner is entitled to the relief sought or to any part thereof and pray that the petition be dismissed.

Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company; Cincinnati, New Orleans and Texas Pacific Railway Company; the Alabama Great Southern Railroad Company and New Orleans and Northeastern Railroad Company, by H. L. Walker, Elmer A. Smith, Their Attorneys.

[fol. 100] *Duly sworn to by C. C. Cameron. Jurat omitted in printing.*

[fol. 101] IN UNITED STATES DISTRICT COURT.

[Title omitted]

SUPPLEMENTAL PETITION—Filed Aug. 15, 1933

Your Petitioner by leave of Court, first had and by reason of entry of appearance, on August 15, 1933, of the following named rail carriers as defendants, to-wit: Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, the Alabama Great Southern Railroad Company and New Orleans and North Eastern Railroad Company.

Your Petitioner prays this Honorable Court to adjudge, order and decree that said defendants rail carriers and each of them shall be perpetually enjoined from assessing, collecting or charging rates on sugar in carloads from New Orleans, La.; Mobile, Ala.; Pensacola, Fla.; and Port Chalmette, La., to destination in Illinois, Indiana, Iowa, Kentucky, Missouri, Ohio, Tennessee, and Wisconsin, which rates were published in Agent Emerson's tariff No. 1-H, I. C. C. 156 and Supplement 48, 10-B I. C. C. 165 and which carry the rates involved in this proceeding, and which rates were considered and approved or considered and specific rates designated by the Interstate Commerce Commission, as specified rates for application by rail carriers, which [fol. 102] particular rates are involved in the decision and orders of the Interstate Commerce Commission in its Docket I. & S. 3814.

Thompson, Mitchell, Thompson and Young by J. R. Van Slyke, Attorneys for Mississippi Barge Line Company.

[fol. 103] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

In Equity. No. 10496

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Defendants, and Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, and New Orleans and Northeastern Railroad Company, Interveners

Decision

MEMORANDUM OPINION—Filed Oct. 13, 1933.

This cause came on to be heard at St. Paul, Minnesota, on the 15th day of August, 1933, before a Court consisting of John B. Sanborn, Circuit Judge, Charles B. Faris, District Judge, and Charles B. Davis, District Judge, upon the application of the petitioner for an injunction.

The petitioner was represented by Mr. James R. Van Slyke, Mr. Samuel A. Mitchell, and Mr. H. L. Harvey (Messrs. Thompson, Mitchell, Thompson & Young were with them on the brief).

The United States was represented by Mr. Elmer B. Collins, Special Assistant to the Attorney General (Mr. Harold M. Stephens, Assistant Attorney General, and Mr. Louis H. Breuer, United States Attorney, were with him on the brief).

The Interstate Commerce Commission was represented by Mr. H. L. Underwood (Mr. Daniel W. Knowlton was with him on the brief).

The interveners were represented by Mr. Horace L. Walker and Mr. Elmer A. Smith.

While the application of the petitioner was for a preliminary injunction, it was agreed by all parties that the suit should be finally determined by the Court upon the record at the hearing.

[fol. 104] The suit is brought by the petitioner against the United States and the Interstate Commerce Commission to enjoin orders of the Commission issued on July 3, 1933, and amended July 18, 1933, in a proceeding entitled "Investigation and Suspension Docket No. 3814, Sugar from Gulf and South Atlantic Points, Sugar Cases of 1933." 194 I. C. C. —.

The facts out of which this controversy arises are, in substance, these:

The petitioner operates as a common carrier by water between New Orleans, Louisiana, and northern points on the Mississippi and Ohio Rivers including St. Louis and Cincinnati. It has a certificate of convenience and necessity from the Interstate Commerce Commission, and it has joined with rail carriers in establishing through routes and joint rates. Its port-to-port rates are, of course, not subject to regulation by the Commission.

Due to the difference in rates charged by the petitioner and other barge lines and those formerly charged by the competing rail carriers, the business of transporting refined sugar from points adjacent to the lower Mississippi River was diverted from the rail carriers. In order to recover this business the competing rail carriers jointly proposed new schedules of reduced rates on sugar from New Orleans to northern points, and, in accordance with Section 6 of the Interstate Commerce Act, filed with the Commission schedules of such rates to become effective October 1, 1932. These schedules established two different sets of rates, one based upon a minimum weight of 60,000 pounds per car, and the other based upon a minimum weight of 80,000 pounds per car. To illustrate the effect of the proposed change: the old rate to Chicago from New Orleans was 56¢ a hundred pounds, and under the proposed new rates the charge was 39¢ a hundred pounds on the lesser minimum per car, and 30¢ a hundred pounds on the greater.

The Interstate Commerce Commission, under Section 15(7) of the Interstate Commerce Act, suspended these rates pending investigation. Protests against the proposed rates were filed by the petitioner and others. After a full hearing and investigation the Commission issued its orders of July 3, 1933, and its amended orders of July 18, 1933. Thereby the Commission approved the proposed rates in so far as they were based upon the 60,000 pound minimum, but did not approve the rates based upon the 80,000 pound minimum, which it found were lower than the necessities of the situation required, and ordered a cancellation of the schedules to that extent. It observed, however, that the circumstances justified a rate on the 80,000 pound minimum four cents higher than that proposed by the railroads, and the railroads were invited to publish and to make effective such rates. Thereupon the railroads did publish and file changed schedules in accordance with the suggestion of the Commission, and such rates became effective.

The petitioner filed with the Commission a motion for a rehearing upon the grounds of changed economic conditions and the alleged failure of the Commission to give effect to the Congressional mandate of Section 500 of the Transportation Act of 1920 (U. S. C., Title 49, Par. 142), which is [fol. 105] directed toward the encouragement of water transportation. This motion was denied. This suit to enjoin the enforcement of the orders in so far as they affect rates from New Orleans followed. It is brought under U. S. C., Title 28, Par. 41(28), and is directed against the Commission and the United States in accordance with the provisions of U. S. C., Title 28, Par. 46.

The petitioner complains of the Commission's orders for the following reasons:

(1) The Commission ignored the policy of Congress as stated in the Transportation Act.

(2) Its decision is unsupported by the evidence and by its findings.

(3) The Commission by its orders has permitted a combination in restraint of trade, which is contrary to the spirit of the Anti-Trust Laws.

(4) The proposed rates will result in irreparable injury and damage to the petitioner.

(5) The orders are arbitrary, discriminatory and unduly preferential in violation of Sections 2 and 3 of the Interstate Commerce Act. (U. S. C., Title 49, Pars. 2, 3.)

(6) The denial by the Commission of the petitioner's application for a rehearing amounted to a denial of a fair hearing.

The United States has moved to dismiss the petition on the ground that the petitioner has no standing in Court because it lacks a sufficient interest in the subject matter of the suit; that the Commission's orders are negative in form and substance and are not such orders as can be enjoined; that the petitioner's bill is without equity and discloses no grounds which entitle the petitioner to an injunction.

The Interstate Commerce Commission asserts that its findings were fully supported by the evidence submitted to it, that it acted contrary to no law or mandate of Congress, and that the petitioner has no such interest in the rates established or permitted by the orders as to enable him to maintain this suit.

The questions presented, then, are substantially these:

1. Has the petitioner such an interest in the subject matter of the suit as entitles him to maintain it?

2. Are the orders of the Commission such as may be enjoined?

3. Do the orders of the Commission sanction a violation of the Anti-Trust Laws and are they for that reason void?

4. In view of the findings of the Commission and of the Congressional policy announced by the Transportation Act, are the orders complained of arbitrary and unduly discriminatory?

[fol. 106] 5. Was the petitioner denied a fair hearing?

In view of the conclusions which we have reached as to the third, fourth and fifth questions, we feel that it is unnecessary to decide whether the petitioner has a right to maintain this suit and whether the orders of the Commission are such as may properly be enjoined. The answer to the third question is obvious. Only the United States can sue to enjoin, for an alleged violation of the Anti-Trust laws, a combination of common carriers subject to the provisions of the Interstate Commerce Act with respect to a matter within the jurisdiction of the Interstate Commerce Commission. U. S. C. Title 15, Par. 26; Central Transfer Co. v. Terminal R. Assoc. of St. Louis (CCA. 8), 61 Fed. (2d) 546, 550, affirmed, 288 U. S. 469, 473.

The record of the proceedings before the Commission has not been presented to this Court, and the affidavits which have been received afford only an imperfect and incomplete picture of the situation. In view of the absence of the record of the evidence which the Commission had before it, we must accept its findings as conclusive.

"* * * obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced." Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117, 125.

See also: L. & P. B. Ry. Co. vs. United States, 257 U. S. 114, 116; N. C. & S. L. Ry. Co. vs. State of Tennessee, 262 U. S. 318, 324; Edward Hines Yellow Pine Trustees vs. United States, 263 U. S. 143, 148; C. I. & L. Ry. Co. vs. United States, 270 U. S. 287, 295; Dept. of Public Works of Washington vs. United States (D. C.), 55 Fed. (2d) 392, 395.

We do not understand that the petitioner denies the conclusiveness of the findings of the Commission in the absence of the record, but its contention is that this Court should hold that the orders of the Commission are upon their face not supported by the Commission's findings and are contrary to such findings and to an established policy of Congress. This policy is enunciated in Section 500 of the Transportation Act of 1920, (U. S. C., Title 49, Par. 142), which reads:

> "It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve, in full vigor both rail and water transportation. * * *"

The Commission found that the interveners were handling practically no long hauls of sugar from the South to the northern distributing points, their sugar traffic consisting only of occasional special or emergency shipments; that the diversion of the sugar traffic to the barge lines in 1932 cost the principal intervener, the Illinois Central Railroad Company, probably half a million dollars in revenue; that sugar constitutes about one-third of the total tonnage of the petitioner and yields over forty percent of is total [fol. 107] revenue; that the rates proposed by the rail carriers were more than high enough to pay the costs of the service rendered; and that many commodities were handled by these roads at lower rates than those proposed for sugar.

It appears that the Federal Barge Line, another carrier by water operating in the same territory and which is also largely dependent upon the sugar traffic for its revenues, does not protest the proposed rates, preferring to let the competing railroads set the rate level. There is no evidence before us which would justify a finding that the petitioner cannot, under favorable conditions, carry sugar at as low a rate as its rail competitors. It is probably not important whether it can or cannot.

The petitioner's claim of arbitrariness is mainly a general one. It does, however, contend that there is great diversity in rates from the Atlantic seaboard and those from the Gulf to the same interior points; that the Commission did not state the particular method of computation by which it arrived at the rate levels it approved, and must have taken a mathematical mean of the costs testified to by witnesses for both sides and then applied a certain differential; and that, while the per-ton per-mile earnings of the roads from this sugar traffic under the new rates would compare favorably with the system earnings of the Illinois Central Railroad, this is an unfair basis of comparison, because the costs of the Illinois Central system are the lowest of any of the roads concerned.

It seems evident to us that the question of the propriety of putting into effect the proposed rates, their reasonableness, and their effect upon shippers and competitors was one peculiarly for the Commission and one into which the courts should not inject themselves unless it clearly appears that the orders of the Commission were arbitrary and that it exceeded its powers in making them. The Commission considered all factors entering into the problem and at least attempted to reach a result which was fair to all parties concerned. The Commission's report indicates a careful analysis of the entire situation. Neither the rates proposed by the railroads nor those suggested by the petitioner were adopted in full. The conclusion of the Commission that the rate levels which it approved and suggested were reasonable and lawful appears to have been supported by the record before it. Assuming, as we must, that these rates are ample to cover the costs of service, we think it is impossible for this Court to say that the orders which the Commission made were arbitrary.

The only question which then remains is whether such orders are in contravention of the policy of Congress enunciated in Section 500 of the Transportation Act hereinbefore quoted. The language of that section is nothing more than a general statement of policy. There is no guaranty contained in it of immunity from competition, nothing to indicate an intention on the part of Congress that a common carrier by water was to be given a preference in the matter of rates over a common carrier by rail, and nothing to indicate that a shipper was to be required to pay for the transportation of a commodity, where rail and water lines were in competition, a rate high enough to enable each carrier to operate at a profit.

[fol. 108] Reduced to its lowest terms the petitioner's contention virtually is that an order of the Interstate Commerce Commission which permits a railroad to reduce its rates to a point which will prevent a barge line from profitably competing with it is arbitrary, discriminatory and void. We cannot agree. If the rates fixed or permitted by the orders would be reasonable in the absence of barge competition, we think they are no less reasonable because of such competition.

The petitioner's contention with respect to the denial of its motion for a rehearing on the ground of changed economic conditions is sufficiently answered by the language of the Supreme Court in United States vs. Northern Pacific Railway Company, 288 U. S. 490, 494:

"The decision in the Santa Fe case (284 U. S. 248) is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public."

Finding the facts and the law to be as we have stated, we reach the conclusion that the defendants and interveners are entitled to a decree dismissing the bill of complaint. They may, upon reasonable notice to the petitioner, present to this Court proposed findings of fact, declarations of law, and a decree, in accordance with the views expressed in this decision.

Dated this 13th day of October, 1933.

John B. Sanborn, U. S. Circuit Judge. C. B. Faris, U. S. District Judge. Charles B. Davis, U. S. District Judge.

[fol. 109] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed Nov. 21, 1933

Findings of Fact

I

The Mississippi Barge Line Company, the petitioner herein, is a common carrier by water operating between New Orleans, Louisiana and points on the Mississippi and

Ohio rivers, including St. Louis, Missouri, Louisville, Kentucky and Cincinnati, Ohio. It has, and operates under, a certificate of public convenience issued by the Interstate Commerce Commission and it has joined with common [fol. 110] carriers by rail subject to the Interstate Commerce Act, in establishing through routes and joint rates on various commodities, including sugar, which said rates are subject to the jurisdiction of the Interstate Commerce Commission. Its port-to-port rates are not subject to regulation by the Commission.

II

By schedules filed with the Interstate Commerce Commission pursuant to Section 6 of the Interstate Commerce Act, to be effective October 1, 1932, the rail carriers serving the sugar refineries at New Orleans, Louisiana, proposed schedules of reduced all-rail rates on sugar from New Orleans and other southern refining points to Chicago, Illinois, St. Louis, Missouri and other points in northern territory.

These schedules established two different sets of rates, one based upon a minimum weight of 60,000 pounds per car, and the other based upon a minimum weight of 80,000 pounds per car. The rate proposed from New Orleans to Chicago was 39 cents per 100 pounds, minimum weight 60,000 pounds, and 30 cents per 100 pounds, minimum weight 80,000 pounds, as compared to the old rate of 56 cents per 100 pounds, minimum 60,000 pounds.

The purpose of the rail carriers in reducing the all-rail rates was to recover the tonnage in sugar which had been diverted to the competing water and truck carriers whose rates were lower and of preventing further losses in that traffic. Such diversion had seriously cut the rail carriers' revenue on this commodity; in 1932, it had cost the Illinois Central Railroad Company about a half million dollars.

[fol. 111] III

By its order dated September 30, 1932, the Interstate Commerce Commission, acting under the provisions of Section 15 (7) of the Interstate Commerce Act, suspended the said proposed rates and instituted a proceeding to determine the lawfulness of said rates. Said proceeding was entitled "Investigation and Suspension Docket No. 3814, Sugar from Gulf and South Atlantic Points." To this proceeding the rail carriers proposing the new rates were made parties respondent. The petitioner herein, Mississippi Valley Barge Line Company, was one of many who protested and opposed the new rates.

Hearings were held in October 1932, on the issues raised by the proceedings, and were participated in by the protestants, including the petitioner in this case; a large volume of testimony was taken, oral argument was had before the Commission, briefs were submitted and thereafter the Commission made and entered its report and order dated July 3, 1933, wherein and whereby it found that the rates proposed for all rail movement at 60,000 pounds minimum were justified, but that those proposed for 80,000 pounds minimum were not justified. It therefore ordered the proceeding dismissed as to the former, thus in effect approving said rates, but as to the latter, it required cancellation of the schedules in so far as the rates based on 80,000 pounds minimum were concerned by the Commission found that the carriers had justified rates 4 cents higher than those proposed for that minimum.

Thereafter by an amendatory order dated July 18, 1933, it authorized the establishment of the rates, 80,000 pounds minimum, approved in its report, namely 4 cents higher than those first proposed. Thereupon the carriers published and filed schedules in accordance with the [fol. 112] order of the Commission, and the rates both on 60,000 pounds minimum and 80,000 pounds minimum went into effect July 29, 1933, and July 31, 1933, respectively.

IV

The Interstate Commerce Commission found that the rates which it approved would be compensatory. It said (report, sheet 21):

> There can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service. The earnings would compare favorably with those of the eastern lines just considered and would generally accrue from single-line straightaway water-level hauls by economically and efficiently operated carriers in a territory of heavy traffic density. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield 240 per minimum

carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26 cents. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15 cents per car-mile and 6 mills per ton-mile. The traffic considered would be principally added tonnage that could probably be carried at far lower costs. Many commodities are handled by respondents at much lower charges than they here propose for sugar. The record affords ample justification for the proposed rates, minimum 60,000 pounds. We are of opinion, however, that the proposed rates, minimum 80,000 pounds, are somewhat lower than the necessities of the situation require, and our findings so recognize.

V

The Interstate Commerce Commission also considered the cost of transportation by barge. It said (report, sheets 14, 15):

> The proposed rate of 30 cents from the New Orleans district to Chicago represents a 26-cent reduction in the present rates of 56 cents. Teh basis for the amount of the proposed rate is the New York-Chicago water rate, which we saw in the above-considered case was last year probably somewhere between 22 and 27 cents, but to which several cents should be added to represent extra terminal expenses and rail service superiority. Protestant Mississippi Valley Barge Line suggests that we hold respondents to a rate of [fol. 113] 40 cents at Chicago, which is the proposed rate that would have applied from New York to Chicago until March 31, 1933.
>
> From the New Orleans district to St. Louis the proposed rate is 28 cents, 2 cents below that proposed to Chicago. It represents a reduction of 24 cents, the present rate being 52 cents. The standard barge-line rate from the New Orleans district to St. Louis was 42 cents, except that the Mississippi Valley Barge Line maintained a rate of 37 cents. This rate was established in anticipation of an announced contemplated reduction of 4.5 cents in the all-rail rate from Louisiana points to St. Louis due to the reduction in the fifth-class rate from Baltimore to Chicago brought about by the eastern class rate revision. The 28-cent rate is based on competition with contract-barge

operators on the Mississippi River. Rates from the New Orleans district to St. Louis as low as 19 cents have been quoted by contract-barge operators for the movement of large cargoes and a rate of 18 cents for this service is regarded as compensatory by parties that should be in position to know, but, so far as appears, such rates have not been used. The contract rate generally paid by one of the principal Louisiana refiners was 20 cents. It covered only transportation and did not include loading, unloading, or marine insurance. The charges for these incidental items, according to one of respondents' witnesses, an official of the refiner mentioned, was between 3 and 4 cents, but according to protestant's witness, a traffic official of the Mississippi Valley Barge Line, they are more nearly 9 cents.

And (report, sheets 15, 16):

The traffic manager of one of the principal refiners suggested 6 cents as a proper differential for the standard barge lines under the all-rail lines. Accepting here a differential of 6 cents for the purpose of discussion and adding it to the 23-cent minimum contract-barge cost, on account of the superior service of the rail lines, makes 29 cents as a minimum from New Orleans to St. Louis, or 1 cent more than the corresponding proposed all-rail rate. Accordingly, even without taking into consideration the fact that most of the river-borne sugar must be stored longer pending distribution, the 28-cent rate may be too low from a competitive standpoint. If the usual 20 per cent differential were applied to that rate, it would reduce to 22.5 cents the standard New Orleans-St. Louis barge rate, which would apply for a much more regular and perhaps otherwise more dependable, desirable, and valuable service than the contract-barge operators provide. It would no doubt stop the use of the contract barges. The maximum all-rail rate from the New Orleans district to St. Louis that would be necessary to narrow the regulated barge lines' differential to about 6 cents, if the 20 per cent basis were used, is 31 cents. The Mississippi Valley Barge Line suggests that we hold respondents to a rate of 38 cents at St. Louis, which, provided the 20 per cent basis is [fol. 114] continued, would reduce the differential in its favor from 10 cents to 7.5 cents, and give protestant a rate of

30.5 cents. A 38-cent rate for respondents from the New Orleans district to St. Louis would far exceed the water rate from New York to Chicago. If the long-and-short-haul rule is to be observed, the rate from the New Orleans district to St. Louis can not exceed that from the same district to Chicago.

VI

The petitioner herein, Mississippi Valley Barge Line Company, filed with the Commission on July 28, 1933, a motion for a rehearing upon the ground of changed economic conditions and the failure of the Commission to give effect to the Congressional mandate of Section 500 of the Transportation Act, 1920 (U. S. Code, Tit. 49, Sec. 142). This motion was denied.

VII

On July 27, 1933, the Mississippi Valley Barge Line Company filed this suit, under U. S. Code, Title 28, Section 41 (28), to enjoin enforcement of the orders of July 3, 1933, and July 18, 1933, in so far as they relate to the proceeding Investigation and Suspension Docket No. 3814.

VIII

The record before the Interstate Commerce Commission, containing the evidence upon which the Commission acted in making and entering its report and orders, was not introduced in evidence in this case before this Court. Affidavits were introduced purporting mainly to show the damage which it was asserted would result to petitioner by reason of the orders of the Commission.

[fol. 115]

Conclusions of Law

I

As the record of the proceedings before the Commission has not been presented to this Court, the Court must accept the findings of the Commission as conclusive.

II

The orders of the Commission upon their face are supported by the findings contained in its report.

III

The findings and orders of the Commission are not arbitrary or discriminatory, or void or in violation of, or contrary to, any provision of law of any mandate of Congress, particularly are they not contrary to the mandate of Section 500 of the Transportation Act, 1920. Said Section 500 contains no guaranty of immunity from competition, nor anything to indicate an intention on the part of Congress that a common carrier by water was to be given a preference over a common carrier by rail, nor anything to indicate that a shipper was to be required to pay for the transportation of a commodity, where rail and water lines are in competition, a rate high enough to enable each carrier to operate at a profit.

IV

The Interstate Commerce Commission in entering the orders complained of did not exceed the power conferred upon it by Congress and did not fail to observe and comply with all the requirements of the applicable law in the proceeding before it, but gave heed to all such laws and proceeded in full conformity to the same.

[fol. 116]

V

There was a full and fair hearing accorded to all parties to the proceeding before the Interstate Commerce Commission, including the petitioner in this suit.

VI

There was no abuse of discretion on the part of the Commission in denying the petitioner's motion for rehearing.

VII

The orders of the Interstate Commerce Commission sought to be enjoined and set aside in this suit are a valid exercise of the authority vested in the Commission and no error was committed by it in the proceedings, findings and orders. The bill of complaint must, therefore, be dismissed.

[fol. 117] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

In Equity. No. 10496

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Defendants

FINAL DECREE—Filed Nov. 21, 1933

This cause came on for final hearing before the specially constituted Court of three Judges, and the Court, having heard and considered the arguments of counsel for the respective parties, and being of opinion, for the reasons set forth in its written decision filed herein on October 13, 1933, that the relief prayed should be denied and the bill of complaint dismissed,

Ordered, adjudged and decreed that the prayer of the bill of complaint be, and the same is hereby denied, and the bill of complaint is dismissed, at plaintiff's costs.

This 21st day of November, 1933.

(Signed) John B. Sanborn, United States Circuit Judge. C. B. Faris, United States District Judge. Charles B. Davis, United States District Judge.

[fol. 118] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed Jan. 16, 1934

To the Honorable John B. Sanborn, United States Circuit Judge; Charles B. Faris, United States District Judge, and Charles B. Davis, United States District Judge:

The Mississippi Valley Barge Line Company, a corporation, your petitioner in the above entitled cause, deeming itself aggrieved by the decree of the three-judge court, prays that it may be permitted to take an appeal from the decree rendered in the above cause on the 21st day of November, 1933, by the said three-judge court, to the Supreme Court of the United States, for the reasons specified in the [fol. 119] assignment of errors which is filed herewith, and prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers on which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, D. C., under the rules of said court in such cases made and provided, said case being appealable to said Supreme Court by virtue of Federal enactment, to-wit, U. S. C. A. Title 28, Sections 47, 47-a.

And your petitioner further prays that a proper order relating to the security to be required of it be made.

Thompson, Mitchell, Thompson & Young, by (Sgd.) J. R. Van Slyke, Attorneys for Petitioner.

Allowed this 16th day of January, 1934.

(Sgd.) Charles B. Davis, District Judge.

[fol. 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 16, 1934

Comes now the Mississippi Valley Barge Line Company, a corporation, petitioner (appellant) in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal in the above entitled cause from the decree entered by the three-judge court on the 21st day of November, 1933, said appeal being to the Supreme Court of the United States:

[fol. 121] I

The three-judge court erred in entering its final decree in the above entitled cause and upon the date above mentioned ordering, adjudging and decreeing that the prayer of the bill of complaint be denied and the bill of complaint dismissed.

II

The three-judge court erred in giving as a finding of fact, and at the request of defendants (appellees), their finding of fact numbered IV which reads as follows:

"'The Interstate Commerce Commission found that the rates which it approved would be compensatory. It said (Sheet 21):

'There can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service. The earnings would compare favorably with those of the eastern lines just considered and would generally accrue from single-line straightaway water-level hauls by economically and efficiently operated carriers in a territory of heavy traffic density. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240 per minimum carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26 cents. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15 cents per car-mile and 6 mills per ton-mile. The traffic considered would be principally added tonnage that could probably be carried at far lower costs. Many commodities are handled by respondents at much lower charges than they here propose for sugar. The record affords ample justification for the proposed rates, minimum 60,000 pounds. We are of opinion, however, that the proposed rates, minimum 80,000 [fol. 122] pounds, are somewhat lower than the necessities of the situation require, and our findings so recognize.' "

III

The three-judge court erred in giving as a conclusion of law, at the request of defendants (appellees) their conclusion of law numbered II, in the following words:

"The orders of the Commission upon their face are supported by the findings contained in its report."

IV

The three-judge court erred in giving as a conclusion of law, at the request of defendants (appellees) their conclusion of law numbered III, in the following words:

"The findings and orders of the Commission are not arbitrary or discriminatory, or void or in violation of, or contrary to, any provision of law or any mandate of Congress, particularly are they not contrary to the mandate of Section 500 of the Transportation Act, 1920. Said Section 500 contains no guaranty of immunity from competition, nor anything to indicate an intention on the part of Congress that a common carrier by water was to be given a preference over a common carrier by rail, nor anything to indicate that a shipper was to be required to pay for the transportation of a commodity, where rail and water lines are in competition, a rate high enough to enable each carrier to operate at a profit."

V

The three-judge court erred in giving as a conclusion of law, at the request of the defendants (appellees) their conclusion of law numbered IV, in the following words:

"The Interstate Commerce Commission in entering the orders complained of did not exceed the powers conferred upon it by Congress and did not fail to observe and comply with all the requirements of the applicable law in the proceedings before it, but gave heed to all such laws and proceeded in full conformity to the same."

[fol. 123] VI

The three-judge court erred in giving as a conclusion of law, at the request of the defendants (appellees) their conclusion of law numbered V, in the following words:

"There was a full and fair hearing accorded to all parties to the proceeding before the Interstate Commerce Commission, including the petitioner in this suit."

VII

The three-judge court erred in giving as a conclusion of law, at the request of the defendants (appellees) their conclusion of law numbered VI, in the following words:

"There was no abuse of discretion on the part of the Commission in denying the petitioner's motion for rehearing."

VIII

The three-judge court erred in giving as a conclusion of law, at the request of the defendants (appellees), their conclusion of law numbered VII, in the following words:

"The orders of the Interstate Commerce Commission sought to be enjoined and set aside in this suit are a valid exercise of the authority vested in the Commission and no error was committed by it in the proceedings, findings and orders. The bill of complaint must, therefore, be dismissed."

IX

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 1 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"1. The court declares the law to be that the Mississippi Valley Barge Line Company has a legal right and interest and is entitled to file and prosecute this action."

[fol. 124]

X

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 2 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"2. That the matters and things presented by the petitioner in its bill are not moot."

XI

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 3 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"3. That the defendant rail carriers who have entered their appearance in this proceeding are subject to the jurisdiction and orders of the court."

XII

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 4 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"4. That Section 500 of the Transportation Act of 1920, by direct mandate, places a duty and requires the Interstate Commerce Commission, as a Federal agency, to follow said statute insofar as rail and water transportation are to be preserved in full vigor."

XIII

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 5 submitted to the court by plaintiff (appellant) in compliance with [fol. 125] suggestion of the court, and in words as follows:

"5. That the decision and order of the Commission upon its face violates and admits a violation of the mandate of this statute."

XIV

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 6 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"6. That the Sherman Anti-Trust law determines a right in this petitioner that rail lines shall not by concerted or joint action or agreement do anything that will directly or indirectly restrain or tend to restrain commerce between the states or produce or tend to produce a monopoly in connection with transportation; that the Interstate Commerce Commission, as a Federal agency, is bound by this enactment and cannot do, order or permit any violation of this right, and since the court in its finding has found that this statute has been disregarded by the Commission in its decision and order and that this right in your petitioner has been denied by the decision and order of the Commission, that, therefore, said decision and order of the Interstate Commerce Commission is unlawful and void."

XV

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 7 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"7. That the Commission in its decision and order admits that said decision and order will result in a violation of the Sherman Anti-trust Law in that it will tend to restrict commerce between the states and produce or tend to produce a monopoly in connection with transportation."

[fol. 126]

XVI

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 8 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"8. That the decision and order of the Interstate Commerce Commission admits that the rates approved or designated for application for rail lines will violate the third section of the Interstate Commerce Act and specifically refers in this connection to Davenport versus Des Moines as a typical example; that the Commission by said statement admits a violation of Section 3 of the Interstate Commerce Act, and the statement of the Commission that the rail carriers intend to cure the situation does not cure the violation and that said decision and order are therefore unlawful and void."

XVII

The three-judge court erred in refusing to give requested finding of fact numbered 9 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"9. That the rail carriers concurring in the Emerson Tariffs, above specifically set forth, since the middle of 1932, have reduced rates on bagging, canned goods, coffee, corn, cotton, glassware, paper pulp, rice, soap, sugar, sulphur and tobacco, which is every commodity handled by the Mississippi Valley Barge Line in excess of 1,000 tons per year."

XVIII

The three-judge court erred in refusing to give requested finding of fact numbered 10 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"10. That sugar tonnage on the Mississippi Valley Barge Line in years past has constituted 33⅓% of its total tonnage moving over and along its lines and approximately 40% of its total revenue."

[fol. 127]

XIX

The three-judge court erred in refusing to give requested finding of fact numbered 13 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"13. That in order for barge line service to attract tonnage to said operation it is necessary and essential that the barge operation charge a rate differentially lower than the all rail rate between the same points."

XX

The three-judge court erred in refusing to give requested finding of fact numbered 17 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"17. That the rail carriers concurring in Agent Emerson's Tariffs and supplements above set forth have, by joint and concurrent action, proposed particular tariffs applicable to rates by rail lines on sugar from various origins and to designated destinations by virtue of affirmative action on the part of the executive officers having to do with said matters by the various rail lines, and that the rates proposed by said rail carriers and the rates approved, designated or authorized by the Commission in its order were intended to and do restrain commerce between the various states and that the Commission in said decision and order recognizes the fact that these rates will have this effect."

XXI

The three-judge court erred in refusing to give requested finding of fact numbered 20 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"20. That the Commission makes no finding that the proposed rates or rates justified or designated are compensatory and such as are incident and necessary to an effective and efficient transportation service, and alone makes the finding that the proposed rates are high enough to pay more than the cost of the service."

[fol. 128]

XXII

The three-judge court erred in refusing to give requested finding of fact numbered 21 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"21. That the rates justified or designated by the Commission will result in a higher rate over the same lines of rail carriers from the gulf ports to points intermediate to St. Louis than to St. Louis and without Fourth Section relief."

XXIII

The three-judge court erred in refusing to give requested finding of fact numbered 22 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"22. That the rates justified or designated to points in the destination territory to which said rates apply will produce a volume of rates to certain destinations which are substantially lower than to adjacent destinations, and that the Commission in said decision admits this violation of Section 3 of the Interstate Commerce Act and justifies or attempts to justify said condition by the statement that the rail carriers intend to clear this condition, and the Court finds that a clearing of the situation such as is mentioned in the decision of the Commission, Davenport vs. Des Moines, by graduating the rates from Davenport to Des Moines, will simply place the violation of Section 3 of points further distant than Des Moines, and that the same situation results in the rates justified or designated to points east of the river and that the Commission attempts to justify this situation alone by the statement that on one is complaining of any injury."

XXIV

The three-judge court erred in refusing to give requested finding of fact numbered 23 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

[fol. 129] "23. That the Mississippi Valley Barge Line will be adversely affected by the rates proposed by the rail carriers and justified or designated by the Commission, and that said rates will result in irreparable injury and damage to the petitioner."

XXV

The three-judge court erred in refusing to give requested finding of fact numbered 24 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"24. That the Mississippi Valley Barge Line petitioned the Interstate Commerce Commission, in accordance with the rules of practice of said Commission and in connection with its Docket I. & S. 3814, and forwarded said motion to the Commission under date of July 25, 1933; that in said petition the Mississippi Valley Barge Line alleged changed conditions which had resulted and obtained since the hearing or the making of the record in said proceeding; that the Commission denied said motion; that said motion for rehearing was in the nature of a supplemental bill, presenting new and radically different situations which had supervened since the record before the Commission was made."

XXVI

The three-judge court erred in refusing to give requested finding of fact numbered 25 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"25. That the petitioner, being advised by the order of the Commission that the rates proposed and justified or the rates designated by the Commission and here involved, would become effective on July 29th and 31st, 1933, respectively, advised the Commission of the intent and purpose of the petitioner in this proceeding to file a suit to enjoin the decision and order of said Commission, and further advised said Commission that the District Judges of the United States District Court at St. Louis, Missouri, are [fol. 130] away from St. Louis and that it was, therefore, impossible for the petitioner to secure an interlocutory stay or order before the effective date of said rates and requested the Commission to change the effective date of said rates so that the petitioner, Mississippi Valley Barge Line Company, could secure and arrange for an expedited hearing by a three-judge court, and thus hold said rates in abeyance until a decision had been rendered by said Court; that said particular communication was addressed to the Commission on July 26, 1933, and on the same day the Interstate Commerce Commission through its Chairman, advised the petitioner that the Interstate Commerce Commission could not consistently comply with the above request, and that said rates have become effective alone by reason of the failure of the Commission to extend the effective date of said rates and without fault upon the part of the petitioner in the instant proceeding."

XXVII

The three-judge court erred in refusing to give requested finding of fact numbered 27 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"27. That the petitioner and parties defendant, including the rail carriers, stipulated and agreed in open court that the affidavits presented by petitioner and defendants should be considered as testimony in said cause and be considered by the Court to determine the facts relative to the matters in controversy, and at the same time agreed and stipulated that they would waive any preliminary writ or order and that the matters and things involved in this proceeding could by the Court be determined as a final order from which an appeal could be taken direct to the Supreme Court of the United States."

XXVIII

The three-judge court erred in failing to consider, give or reject any and all of the conclusions of law or finding of fact presented to the court by the plaintiff (appellant) in accordance with the suggestion of the court. This includes [fol. 131] matters specifically set forth in paragraph IX to and including XVII specifically set forth above.

Wherefore, petitioner prays that said decree be reversed, and for such other and further relief as to the court may seem just and proper.

Dated the 16th day of January, 1933.

Thompson, Mitchell, Thompson & Young, (by (Sgd.) J. R. Van Slyke, Attorneys for Petitioner (Appellant).

[fol. 132] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed Jan. 16, 1934

The petition of Mississippi Valley Barge Line Company, a corporation, petitioner in the above entitled cause, praying appeal from the final decree heretofore entered in this Court dismissing its petition, being now presented,

It is hereby ordered that an appeal be allowed to the Supreme Court of the United States as prayed for and that a certified transcript of the record, testimony, stipulations, and all proceedings be forthwith transmitted to the Supreme Court of the United States in a manner provided by law.

[fol. 133] It is further ordered that bond for costs on appeal to be given by petitioner be, and the same hereby is fixed at the sum of Five Hundred Dollars ($500.00), conditioned as provided by law.

Dated the 16th day of January, 1934.

Charles B. Davis, District Judge.

[fols. 134 & 135] Bond on appeal for $500.00 approved and filed Jan. 16, 1934, omitted in printing.

[fol. 136] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 31, 1934

To the Clerk of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri:

In making up the transcript of the record in the above entitled cause for the Supreme Court of the United States upon appeal of the petitioner therein, will you please incorporate into such transcript the following portions of the record:

1. Amended bill of petitioner, also Exhibit "A" and Exhibit "B", to-wit, decision and order of the Commission under date of July 3, 1933, attached to the original bill, [fol. 137] and substituted Exhibit "C", being amended order of the Commission under date of July 18, 1933, and supplemental petition asking affirmative relief against designated rail lines after their intervention at the hearing at St. Paul, Minnesota.
2. Answer of the United States of America as filed in said cause.
3. Answer of the Interstate Commerce Commission as filed in said cause.
4. Entry of appearance, including caption, of railroad interveners.
5. Answer as filed in said cause of interveners, Illinois Central Railroad Company, et al.
6. Statement of the evidence.
7. Opinion of the Court.
8. Decree of the Court.
9. Petition for appeal.
10. Bond on appeal.
11. Order allowing appeal.
12. Assignment of errors.
13. Conclusions of law numbered I, II, III, IV, V, VI, and VII as requested by the defendants and given by the Court.
14. Findings of fact numbered I, II, III, IV, V, VI, VII and VIII requested by the defendants and given by the Court.
15. Findings of fact numbered 1 to 27, inclusive, requested by the petitioner—no action taken by the Court.
16. Declarations of law numbered 1 to 12, inclusive, requested by the petitioner—no action taken by the Court.
17. Citation.
18. Statement of jurisdiction.
19. Præcipe.

[fol. 138] The above being a full and complete record in this cause.

Thompson, Mitchell, Thompson & Young, by J. R. Van Slyke, Attorneys for Petitioner, Appellant.

The undersigned attorneys for the defendant and interveners in the above entitled cause hereby acknowledge service of a copy of the above Præcipe this 19 day of January, 1934.

The United States of America, by J. Crawford Biggs (A. Q.), Solicitor General. The Interstate Commerce Commission, by H. L. Underwood. Intervening Railroad Lines, other than Illinois Central Railroad Company and Louisville and Nashville R. R. Co., by Horace L. Walker. Elmer A. Smith for Illinois Central Railroad Company and Louisville and Nashville Railroad Company.

[fol. 139] IN UNITED STATES DISTRICT COURT

CERTIFICATE—Filed Feb. 15, 1934

I, the undersigned, Honorable Charles B. Davis, certify that on or before August 30, 1933, the attorneys for Mississippi Valley Barge Line Company submitted to each of the Judges of the three-judge court, requested declarations of law and findings of facts, and that the following are true copies thereof and that no action was taken upon said request by the Judges of the *the* three-judge court.

Charles B. Davis, Judge.

[fol. 140] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED FINDINGS OF FACT—Filed Feb. 15, 1934

Your petitioner presents the following finding of facts and requests the Court to find in accordance therewith:

1. That the Mississippi Valley Barge Line Company is a corporation duly organized and existing by virtue of law and authorized under its charter to engage in the transportation business as a common carrier of passengers or freight for hire.

2. That said corporation is now engaged in said business and owns, maintains and operates a line of tow-boats and

barges on the Mississippi and Ohio Rivers serving ports New Orleans, Louisiana, Cincinnati, Ohio, St. Louis, Mis- [fol. 141] souri, and ports intermediate thereto; that its principal operating office is now and at all times mentioned in said bill was situated in the City of St. Louis in the Eastern Division of the Eastern Judicial District of Missouri.

3. That one or more of the participating carriers in Agent Emerson's Tariff, Supplement No. 54, No. 1-H, I. C. C. No. 156, and Supplement 48, 10-B, I. C. C. 165, are corporations organized under the laws of the State of Missouri and have their principal office in this judicial district.

4. That the Mississippi Valley Barge Line Company, in accordance with 45 Stat. 978, as amended May 29, 1928, (U. S. C. A. Title 49, Section 152, et seq.), as a corporation engaged or about to engage in common carrier service on the Mississippi River and its tributaries, did obtain from the Interstate Commerce Commission a certificate of public convenience and necessity in Ex Parte 99 (167 I. C. C. 41), and that the Interstate Commerce Commission in said proceeding and upon hearing found that the petitioner was an operation in public interest and of public convenience, and that said certificate is still in force and effect.

5. That various rail carriers, including those specifically designated in Exhibit "A" attached to the bill of complaint, presented tariffs to the Interstate Commerce Commission, to-wit, Supplement No. 54 to Agent Emerson's Tariff No. 1-H, I. C. C. 156, and Supplement No. 48, 10-B, I. C. C. 165, to become effective October 1, 1932; that the petitioner, on or about, to-wit, September 8, 1932, applied [fol. 142] by petition to the Interstate Commerce Commission and protested said rates and requested suspension; that thereupon and thereafter the Commission upon said petition suspended said rates and entered its order of investigation and suspension, its docket No. 3814, designated "Sugar Rates from Gulf Ports", and said Commission, after a hearing in which the petitioner participated under the rules of the Commission, rendered a decision and order under date of July 3, 1933, which decision and order was released from the office of the Commission and received by the petitioner on July 17, 1933, and that final order of the

Commission in connection with said decision was entered as of July 3, 1933, as amended July 18, 1933; that said decision and order of the Commission is attached to the bill of complaint and marked "Exhibit B", which contains the order of July 3, 1933, and substituted Exhibit "C", filed by leave of court, which contains the amended order as of July 18, 1933.

6. That the matter complained of in said petition before the Commission arose in connection with matters in the Eastern Division of the Eastern Judicial District of Missouri; that the United States of America is made a defendant in this suit pursuant to District Court Jurisdictional Act, Sections 45-a and 46, 38 Stat. 219 and 36 Stat. 1149, respectively.

7. That the Interstate Commerce Commission is an administrative tribunal created by the Act to Regulate Commerce, and is specifically charged with the administration and enforcement of the Interstate Commerce Act.

8. That the Interstate Commerce Commission in its Docket I. & S. 3814 and in said order, referred to said decision and made same a part of said order, and that said [fol. 143] Commission in said decision and order found that the purpose of the rail lines in the proposing of the rates contained in the tariff aforementioned was a drastic and sweeping reduction in rates, and that said rail lines would consider even lower rates than those proposed if said rates "do not prove sufficiently effective", and further found that the rates proposed and by the Commission found justified would result in a staggering blow to the water barge lines and would probably bring to rail carriers a heavy traffic, would stop a large part of the distribution of water-borne sugar, and dry up much of the water movement; that the proposed rates in 1931 would have cost the Federal Barge Line about $350,000.00 and wiped out its showing of net revenue; that the usual water-truck rates to interior points north and south of the Ohio River are probably from 5 to 15 cents higher than the proposed all rail rates of 28 and 30 cents, and that the Commission found that the rates of the certificated barge line from New Orleans to St. Louis was 37 to 42 cents per 100 pounds on movement of sugar.

9. That the rail carriers concurring in the Emerson Tariffs, above specifically set forth, since the middle of

1932, have reduced rates on bagging, canned goods, coffee, corn, cotton, glassware, paper pulp, rice, soap, sugar, sulphur and tobacco; which is every commodity handled by the Mississippi Valley Barge Line, in excess of 1,000 tons per year.

10. That sugar tonnage on the Mississippi Valley Barge Line in years past has constituted 33-1/3% of its total tonnage moving over and along its lines and approximately 40% of its total revenue.

[fol. 144] 11. That the purpose of the rail carriers in proposing the rates in question is to restrict commerce between the states and will tend to produce a monopoly in the movement of sugar over the rail lines.

12. That the rates applicable to the 60,000 pounds minimum justified by the decision and order of the Commission in I. & S. 3814, and the rates designated and authorized for application on the 80,000 pounds minimum, which rates have become effective, will cripple or entirely eliminate the petitioner from continuing its operation as a barge line.

13. That in order for barge line service to attract tonnage to said operation it is necessary and essential that the barge operation charge a rate differentially lower than the all rail rate between the same points.

14. That under the proposed or designated rates a major portion of the sugar tonnage will move on the lower rate, to-wit, 80,000 pound minimum.

15. That the Commission in its decision and order justified the rates proposed on the 60,000 pounds minimum and authorized the rail carriers to increase the proposed rates on the 80,000 pounds minimum 4¢ per 100 pounds, and that said rates are the only rates that could have been published by virtue of the order and authorization of the Commission.

16. That the rates proposed by the rail carriers and either justified, designated or authorized for rail application are below the present rates of the certificated barge line, both as to rates from gulf ports to interior destinations and rates from the gulf ports to ports upon the Ohio [fol. 145] and Mississippi Rivers served by the petitioner.

17. That the rail carriers concurring in Agent Emerson's Tariff and supplements above set forth have, by joint and

concurrent action, proposed particular tariffs applicable to rates by rail lines on sugar from various origins and to designated destinations by virtue of affirmative action on the part of the executive officers having to do with said matters by the various rail lines, and that the rates proposed by said rail carriers and the rates approved, designated or authorized by the Commission in its order were intended to and do restrain commerce between the various states and that the Commission in said decision and order recognizes the fact that these rates will have this effect.

18. That the rail rates found not justified by the Commission on the 80,000 pounds minimum were increased 4¢ and the rail carriers were authorized to put said rates into effect; that said rates so designated do not affect or change the situation with reference to the intent of the rail carriers or the effect of said rates, in so far as the rates designated by the Commission will tend to produce this result, for the reason that the Commission in its decision finds that the competitive rate that the rail lines are attempting to meet and the rates proposed to interior points north and south of the Ohio River will be from 5 to 15 cents lower than the barge-truck rate and increasing this rate 4 cents still leaves this statement as controlling and makes a difference in the rates of 1 to 11 cents upon the 80,000 pounds minimum, and that in from port to port rates the increase of 4¢ does not bring this rate to the level of the present rate charged by certificated barge lines.

[fol. 146] 19. That the decision of the Commission admits that it is improbable that the rail carriers by the rates proposed or designated can or will recapture sugar tonnage in sufficient amounts to compensate them for the loss which they will sustain in the present movement and under the rates charged by the order of this Commission.

20. That the Commission makes no finding that the proposed rates or rates justified or designated are compensatory and such as are incident and necessary to an effective and efficient transportation service, and alone makes the finding that the proposed rates are high enough to pay more than the cost of the service.

21. That the rates justified or designated by the Commission will result in a higher rate over the same lines of

rail carriers from the gulf ports to points intermediate to St. Louis than to St. Louis and without Fourth Section relief.

22. That the rates justified or designated to points in the destination territory to which said rates apply will produce a volume of rates to certain destinations which are substantially lower than to adjacent destinations, and that the Commission in said decision admits this violation of Section 3 of the Interstate Commerce Act and justifies or attempts to justify said condition by the statement that the rail carriers intend to clear this condition, and the Court finds that a clearing of the situation such as is mentioned in the decision of the Commission, Davenport vs. Des Moines, by graduating the rates from Davenport to Des Moines, will simply place the violation of Section 3 of points further distant than Des Moines, and that the same [fol. 147] situation results in the rates justified or designated to points east of the river and that the Commission attempts to justify this situation alone by the statement that no one is complaining of any injury.

23. That the Mississippi Valley Barge Line will be adversely affected by the rates proposed by the rail carriers and justified or designated by the Commission, and that said rates will result in irreparable injury and damage to the petitioner.

24. That the Mississippi Valley Barge Line petitioned the Interstate Commerce Commission, in accordance with the rules of practice of said Commission and in connection with its Docket I. & S. 3814 and forwarded said motion to the Commission under date of July 25, 1933; that in said petition the Mississippi Valley Barge Line alleged changed conditions which had resulted and obtained since the hearing or the making of the record in said proceeding; that the Commission denied said motion; that said motion for rehearing was in the nature of a supplemental bill, presenting new and radically different situations which had supervened since the record before the Commission was made.

25. That the petitioner, being advised by the order of the Commission that the rates proposed and justified or the rates designated by the Commission and here involved,

would become effective on July 29th and 31st 1933, respectively, and advised the Commission of the intent and purpose of the petitioner in this proceeding to file a suit to enjoin the decision and order of said Commission, and further advised said Commission that the District Judges of the United States District Court at St. Louis, Missouri, are away from St. Louis and that it was, therefore, im-[fol. 148] possible for the petitioner to secure an interlocutory stay or order before the effective date of said rates and requested the Commission to change the effective date of said rates so that the petitioner, Mississippi Valley Barge Line Company, could secure and arrange for an expedited hearing by a three-judge court, and thus hold said rates in abeyance until a decision had been rendered by said Court; that said particular communication was addressed to the Commission on July 26, 1933, and on the same day the Interstate Commerce Commission, through its Chairman, advised the petitioner that the Interstate Commerce Commission could not consistently comply with the above request and that said rates have become effective alone by reason of the failure of the Commission to extend the effective date of said rates and without fault upon the part of the petitioner in the instant proceeding.

26. That the parties, petitioner and defendants, including the rail carriers, in open court consented that Honorable John B. Sanborn, Circuit Judge, should sit instead of Honorable Archibald K. Gardner, designated in the original order forming a three-judge court.

27. That the petitioner and parties defendant, including the rail carriers, stipulated and agreed in open court that the affidavits presented by petitioner and defendants should be considered as testimony in said cause and be considered by the Court to determine the facts relative to the matters in controversy, and at the same time agreed and stipulated that they would waive any preliminary writ or order and that the matters and things ~~involved in this~~ proceeding could by the Court be determined, as a final [fol. 149] order from which an appeal could be taken direct to the Supreme Court of the United States.

The above request for finding of facts is presented in behalf of the Mississippi Valley Barge Line Company.

Thompson, Mitchell, Thompson & Young, by J. R. Van Slyke, Its Attorneys.

[fol. 150] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED DECLARATIONS OF LAW—Filed Feb. 15, 1934

The Mississippi Valley Barge Line Company, petitioner in the above entitled cause, requests the Court to make the following declarations of law in the instant proceeding:

1. The Court declares the law to be that the Mississippi Valley Barge Line Company has a legal right and interest and is entitled to file and prosecute this action.

2. That the matters and things presented by the petitioner in its bill are not moot.

3. That the defendant rail carriers who have entered their appearance in this proceeding are subject to the jurisdiction and orders of this Court.

[fol. 151] 4. That Section 500 of the Transportation Act of 1920, by direct mandate, places a duty and requires the Interstate Commerce Commission, as a Federal agency, to follow said statute insofar as rail and water transportation are to be preserved in full vigor.

5. That the decision and order of the Commission upon its face violates and admits a violation of the mandate of this statute.

6. That the Sherman Anti-Trust Law determines a right in this petitioner that rail lines shall not by concerted or joint action or agreement do anything that will directly or indirectly restrain or tend to restrain commerce between the states or produce or tend to produce a monopoly in connection with transportation; that the Interstate Commerce Commission, as a Federal agency, is bound by this enactment and cannot do, order, or permit any violation of this right, and since the Court in its finding has found that this statute has been disregarded by the Commission in its decision and order and that this right in your petitioner has been denied by the decision and order of the Commission, that, therefore, said decision and order of the Interstate Commerce Commission is unlawful and void.

7. That the Commission in its decision and order admits that said decision and order will result in a violation of

the Sherman Anti-Trust Law in that it will tend to restrict commerce between the states and produce or tend to produce a monopoly in connection with transportation.

8. That the decision and order of the Interstate Commerce Commission admits that the rates approved or designated for application for rail lines will violate the third [fol. 152] section of the Interstate Commerce Act and specifically refers in this connection to Davenport vs. Des Moines as a typical example; that the Commission by said statement admits a violation of Section 3 of the Interstate Comerce Act and the statement of the Commission that the rail carriers intend to cure the situation does not cure the violation and that said decision and order are therefore unlawful and void.

9. That the Court has jurisdiction in the instant proceeding to annul and set aside the decision and order of the Interstate Commerce Commission in connection with its Docket I. & S. 3814.

10. That the Court has jurisdiction over the defendant rail carriers who have entered their appearance, to enjoin said defendants and each of them from assessing, collecting or charging the rates proposed or designated by the Commission in connection with its decision and order and in its Docket I. & S. 3814.

11. The Court declares the law to be that under the pleadings and evidence in this cause, the petitioner is entitled to affirmative relief against the order of the Interstate Commerce Commission, its Docket I. & S. 3814.

12. That the petitioner is entitled to a permanent injunction against the defendant rail carriers from assessing, collecting or charging the rates justified or designated by the Commission in its decision and order and in its Docket I. & S. 381

The above declarations of law are requested in behalf of [fol. 153] Mississippi Valley Barge Line Company, petitioner.

Thompson, Mitchell, Thompson & Young, by J. R. Van Slyke, Its Attorneys.

[fol. 154] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

In Equity. No. 10496

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Defendants, and Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, and New Orleans and Northeastern Railroad Company, Interveners

Appellant (petitioner) presents statement of evidence in the above entitled cause which it will ask to be incorporated in the record of said cause upon appeal to the Supreme Court of the United States.

Statement of Evidence—Filed Jan. 31, 1934

[fol. 155] Commission's Decision and Orders of July 3, 1933, and July 18, 1933, I. & S. 3814

(These are exhibits attached to original petition and admitted by all defendants in their answers as being true copies thereof. Each is fully set forth in connection with the pleadings.)

The evidence herein set forth in behalf of appellant was presented to the three-judge court at the hearing of said cause at St. Paul, Minnesota, on August 15, 1933, and said testimony was originally presented in the form of affidavits to the introduction of which defendants and interveners objected on the ground that said affidavits and the contents thereof were inadmissible in so far as they stated or purported to state facts inconsistent with, or in conflict with the statements and findings contained in the report of the Interstate Commerce Commission dated July 3, 1933, upon which the orders of the Commission assailed in this case were predicated. The affidavits were received subject to said objection.

At the conclusion of the hearing the petitioner, through its counsel, stated that if all parties to the proceeding would agree that the statements contained in said affidavits could and should be considered by the court as competent evidence upon final hearing by said court that the petitioner was agreeable to waiving a preliminary writ; that defendants and interveners agreed that the statements contained in said affidavits could be considered by the court as competent evidence upon a final hearing subject to said objection. Thereupon, the cause was submitted to the court for final hearing and a final decree.

The affidavits of M. L. Costley and J. L. Sheppard presented by the interveners were not objected to by the appellant and are to be considered as testimony in said cause.

(Caption, signatures and jurats are omitted in connection with the testimony hereinafter set forth.)

M. W. Howe, Phil G. Safford, L. W. Childress, J. R. Van Slyke and J. D. Beeler—testimony was presented in behalf of petitioner.

M. L. Costley and J. L. Sheppard—testimony was presented in behalf of the Railroad Companies, interveners in said action.

[fol. 156] M. W. Howe, being duly sworn, upon his oath states that he is now General Freight Agent of the Mississippi Valley Barge Line and since 1930 has been employed by said Company in its traffic department.

Affiant states that he is familiar with matters pertaining to transportation and traffic of the Mississippi Valley Barge Line, and for approximately twelve years has been associated with and employed by rail and other forms of transportation service in their traffic departments.

Affiant states that W. P. Emerson is Agent and Attorney and has specific Power of Attorney for certain carriers specifically listed on pages 5-A to 10-A of his freight tariff 1-H, I. C. C. No. 156, and on pages 8-A to 11-A of his freight tariff 10-B, I. C. C. No. 165, and affiant herewith submits said tariffs, and by reference makes same a part of this affidavit, and affiant further submits and by reference makes a part of this affidavit Supplement No. 54 to Agent Emerson's I. C. C. 156, and Supplement 48 to Agent Emerson's [fol. 157] I. C. C. 165, and states that said supplements to said tariffs are a part of and issued for account of the designated participating carriers in the original tariff, and that said supplements specifically set forth the rates on sugar in carloads involved in the decision of the Commission in I. & S. 3814.

Affiant further states that the Mississippi Valley Barge Line, a corporation, protested said proposed rates by petition to the Interstate Commerce Commission on or about September 8, 1932, and said petition for suspension was addressed to said proposed rates on sugar from New Orleans and other designated gulf ports to various destinations specifically designated in said tariffs and supplements, and that said Commission, in response to petition of protest, suspended said rates and entered an order of investigation and suspension in its docket I. & S. 3814, and that thereafter said Commission entered upon a hearing and investigation and rendered a decision which was dated July 3, 1933, but was not released by the Commission or received by the Mississippi Valley Barge Line until July 17, 1933, and that said decision and order of the Commission was received by the Mississippi Valley Barge Line Corporation on said date, to-wit, July 17, 1933, and the Commission thereafter and on, to-wit, the 18th day of July, 1933, entered an amended order which substituted certain paragraphs for paragraphs 1, 2, 3, and 4 of the original order of the Commission above referred to, but that, insofar as said amended order changed the original order, it only affected the effective date of the rates justified or designated by the Com- [fol. 158] sion in said decision and order and in docket I. & S. 3814 by postponing the designated effective date for an additional seven days beyond that originally authorized.

Affiant further states that sugar tonnage constitutes an important movement of the petitioner's line.

Affiant further states that, from his knowledge, experience, contact, and conversation with refiners and shippers of sugar, that traffic will not move by barge if barge rates are the same as rail rates, and that this situation is recognized by shippers, traffic officials, and has been recognized by the Interstate Commerce Commission.

Affiant further states that, from his experience in connection with the movement of sugar by transportation agencies, he knows that the publication of lower rates, at a minimum weight of 80,000 pounds per car, than those applicable for minimum weights of 60,000 pounds per car, will result in the movement of the great preponderance of tonnage at the lower rate and upon the 80,000 pound minimum. Affiant further states that he has read and familiarized himself with the decision and order of the Commission in the instant proceedings I. & S. 3814, and that in said decision the Commission recognizes that the rates proposed by the rail carriers from gulf ports to the destinations specifically designated in their tariffs and supplements above referred to to points north and south of the Ohio River, rail rates for application on 80,000 pound minimum carloads will be from five to fifteen cents less than the competitive rate of a barge-truck movement, and that the particular rate on the 60,000 pound minimum proposed by the rail lines is [fol. 159] justified by the decision and order of the Commission, and that, insofar as the 80,000 pound minimum the Commission has designated and authorized the concurring carriers in the tariffs above mentioned to increase said proposed rates by four cents per 100 pounds, and to establish and publish rates in accord with said authorization, and that said rates so designated and authorized by the Commission results in rates to interior points north and south of the Ohio River from one to eleven cents less than the competitive rate for barge-truck movement from the same origins to the same destinations, that the rates so found justified or designated by the Commission, in his opinion and from his acquaintance and knowledge of traffic matters, will necessarily result in the entire loss of sugar tonnage to barge lines unless the barge lines reduce their rates to a figure below the rail rates justified or designated by the Commission, and affiant further states that giving consideration to the movement of sugar over the petitioner's line during the years that he has been connected with the company that such reductions will result in a depletion of his company's revenue and to such an extent that will make the continued operation of the Mississippi Valley Barge Line an unprofitable venture.

Affiant further states that insofar as the commission in its decision has attempted to give consideration to alleged cost to shipper of sugar over contract barge lines, that the situation of contract barge line operations in the first half of the year 1933 has entirely changed from that in effect during 1932.

That during 1932 these contract barge operators were [fol. 160] able to secure from private owners certain tow boats and barges for use in the movement of sugar, customarily used in said owners' business, which tow boats and barges have now been withdrawn from use of the contract barge operators, and affiant further states that by reason of this withdrawal and other causes the contract operators handling sugar in 1932 have all ceased operations, with the exception of the American Barge Line, whose rate is 25 cents per 100 pounds, for application on Lots of 450 tons, which rate does not include the terminal expenses of approximately 9 cents to cover cost of loading, unloading, and other expenses necessary to effect delivery. Affiant further states that the service of the American Barge Line is infrequent and that said Company moves a small percentage of the sugar moved by water lines. Affiant further states that since the hearing of the instant docket before the Commission, by far the major portion of sugar moved by water carriers had moved on the rates and via the service of certificated barge lines and at rates substantially higher than the 25 cent rate above mentioned, that the rates designated on the 80,000 pound minimum from New Orleans and related ports by all rail movement to St. Louis is 32 cents, and that the rate authorized by the Commission in its decision and order is lower by five to ten cents than the rates on sugar moved by certificated barge lines, and affiant further states, taking into comparison the rates justified by the Commission for rail movement and the above rates charged by certificated barge lines, will necessarily result in the elimination of movements of sugar by the certificated barge lines and, further, that if any sugar is to move over barge lines, it will be necessary for the barge line to [fol. 161] reduce its rate for this port to port movement lower than the rates justified or designated by the Commission in its decision and order for application for rail movement, and that such a reduction in its rates, giving consideration to the tonnage of sugar that it has moved in the past, will necessarily result in a material and substantial depletion of its revenue and, in the opinion of affiant, will render the continued operation of the Mississippi Valley Barge Line an unprofitable undertaking.

Affiant further states that the concurring carriers designated in the particular tariffs and supplements above mentioned have, since the presentation of said sugar rates, or approximately at the same time, reduced in substantial amounts the rates of a large majority of the commodities which have been moved by barge lines and by this company, and that the reduction in the rates on said commodities has resulted in substantial reduction of the revenues of your petitioner. Affiant further states that said reductions were made by said carriers for the alleged purpose of meeting water competition and that said reduction in rates were not general in their application.

Affiant further states that the Commission, in its decision, justifies rates from New Orleans and other gulf ports to points in Arkansas and adjacent territory which are higher than rates for points beyond, and, as a specific example, cites that the rates fixed by the Commission from New Orleans to Jonesboro, Arkansas, is 34 cents for 486 miles, and that Jonesboro, Arkansas, is intermediate be- [fols. 162 & 163] tween New Orleans and St. Louis via direct route, and that the rate fixed by the Commission from New Orleans to St. Louis is 32 cents, that no Fourth Section relief is granted to the southern line and that said rates from New Orleans to St. Louis so contrasted with the rates to intermediate points violates the Fourth Section of the Act in that they permit and justify a higher rate for a shorter distance than for a longer distance over the same route.

Affiant further states that the short line rail distance from New Orleans to Des Miones, Iowa, is 1,016 miles, a short line rail distance from New Orleans to Davenport is 919 miles, that, according to the decision of the Commission, the rate from New Orleans to Davenport found justified on 80,000 pounds minimum is 34 cents, while the going rate from New Orleans to Des Moines, Iowa, will be 67 cents, that the Commission, in its decision, recognizes that this results in violation of the Interstate Commerce Act, but attempts to justify said situation by the statement that the rail lines intend to relieve and cure this violation. Affiant further states that, in his opinion, the only way in which this violation can be cured is by the adjustment of the rates to Des Moines to reduce rates to that point to 34 cents, thus reinstating the former parity of rates with those in effect to Davenport, which will in turn create the same relative maladjustments to points beyond Des Moines.

[fol. 164] PHIL G. SAFFORD, being duly sworn, upon his oath states:

That he is assistant to the president of the Mississippi Valley Barge Line, and for a period of more than twenty years has been connected with railroads and other transportation agencies and in the traffic department.

Affiant further states that in behalf of the Mississippi Valley Barge Line Company he has been charged with the responsibility of matters pertaining to its traffic and the rates to be charged upon same; that he has come in contact with shippers and executives of rail lines with reference to transportation by rail and water.

Affiant further states that he is familiar with various tariffs that have been published and presented to the Commission in connection with various rates and upon particular commodities which have been prescribed for the alleged purpose of meeting water transportation; that the southern lines, who are concurring carriers in Agent Emerson's Tariffs referred to in the petition in the instant case, have since June, 1932, and from time to time proposed certain tariffs which have carried substantial reduction in rates on the following commodities: Bagging, canned goods, coffee, corn, cotton, glassware, paper and paper products, pulp (paper), rice, soap, sugar, sulphur and tobacco. The rates on canned goods, cotton, rice, soap, tobacco, sulphur, corn, glassware, paper and sugar published by the rail carriers since June, 1932, represent reduction in prior rates of from fifteen to forty-five per cent below rates theretofore fixed by the Interstate Commerce Commission as reasonable rates and in various proceedings. The rates so reduced by southern carriers are made solely upon commodities which [fol. 165] move by barge line to and via ports on the Mississippi and Ohio Rivers.

Affiant further states that said southern lines, concurring carriers in Emerson's Tariffs, have not correspondingly reduced rates on other commodities which do not move in connection with the barge line.

Affiant further states that the reduction which the southern lines have been put into effect on the various commodities above specifically mentioned and the reductions allowed by the Commission on sugar in I. & S. Docket 3814 substantially affect the revenues of the Mississippi Valley Barge Line. These commodities constitute sixty per cent (60%) of the volume of the business which the barge line has been able to move. Affiant is not aware of any movement that can compensate the loss of the revenues occasioned by said reductions. Affiant further states that these losses of revenue and tonnage will prevent the continuation of the operations of the Mississippi Valley Barge Line Company as a profitable venture.

L. W. Childress, being duly sworn, upon his oath states:

That he is now and at all times hereinafter mentioned was President of the Mississippi Valley Barge Line Company, a corporation.

That said corporation was organized under the laws of the State of Delaware and that said company is authorized to engage in and carry on a general transportation business in any and all of its branches, both freight and passenger, and to build, construct, and own various equipments incident and necessary to said operation, and to perform any and all other functions incident and necessary to said business. Your affiant hereto attaches copy of said certificate [fol. 166] of incorporation and by reference thereto makes it a part of this affidavit.

Affiant further states that he promoted and organized said corporation and that in said undertaking he was familiar with and advised of the provisions of Section 500 of the Transportation Act of 1920, and relied upon the mandate of said Act that both rail and water transportation would be preserved in full vigor.

Affiant further states that said corporation has a capital stock of $3,500,000.00 fully paid, and that in its organization no sums were paid for promotions or commissions.

Affiant further states that he was further influenced in promoting said venture by reason of the fact that the Federal Government had and was appropriating huge sums of money for the purpose of making the Ohio, Mississippi and their tributaries navigable for water-borne tonnage and had provided by enactment for a corporation to be operated by the Federal Government to demonstrate the feasibility and economy of water transportation and specifically designated in said enactment that the demonstration was for the purpose of eventually attracting private capital to undertake and continue said operation.

Affiant further states that pursuant to its charter and after the incorporation, it proceeded and purchased four (4) tow-boats of 2,000 h. p. capacity, fifty (50) barges of 310-ton capacity each and erected or leased terminals at river ports upon and along the Mississippi and Ohio Rivers and that the total investment of said corporation at the present time in said terminals and equipment is approximately in the sum of $3,498,693.11 and that said company began operations on the Ohio and Mississippi Rivers as a [fol. 167] common carrier of freight for hire on or about October 5, 1930, and since said date has been continuing said operations upon regular schedule with dependable service.

Your affiant further states that in conformity with law it applied to the Interstate Commerce Commission prior to the completion of equipment and terminals for a certificate of convenience and necessity in Exparte 99, 167 I. C. C. 41, and that after a public hearing said Interstate Commerce Commission did on or about July 11, 1930, issue a certificate of public convenience and necessity to the Mississippi Valley Barge Line, your petitioner in the instant proceedings; and said Commission specifically found and by order issued stated:

> "That the present and future public convenience and necessity require the operation of the Mississippi Valley Barge Line as a common carrier upon the Mississippi and Ohio Rivers between New Orleans and Cincinnati, Ohio, and intermediate points."

And that thereafter, and on the 11th day of March, 1932, by supplemental application, the Commission issued additional authority to the Mississippi Valley Barge Line, by virtue of its order, finding that the present and future public convenience and necessity require the operation of the Mississippi Valley Barge Line as a common carrier on the Mississippi River between New Orleans and St. Louis and intermediate points.

Affiant hereto attaches copies of said order of the Interstate Commerce Commission.

Affiant further states that he has been in immediate and direct contact with the management and operation of the Mississippi Valley Barge Line since its inception, is familiar with the character of tonnage that it has moved and the particular origins and destinations of said tonnage and has kept exact records of the revenues obtained in the movements of said tonnage.

[fol. 168] Affiant further states that said corporation has now reached the point where the gross earnings slightly exceed the operation and overhead expenses.

Affiant further states that the principal office and executive headquarters of the Mississippi Valley Barge Line are now and at all times mentioned in said petition were situated in the City of St. Louis, State of Missouri, and in the Eastern Division of the Eastern Judicial District of Missouri.

Affiant further states that Agent Emerson's Tariff No. 1-H, I. C. C. No. 156, Supplement No. 54, and his 10-B, I. C. C. 165, Supplement No. 48, proposed reductions in the rates on sugar in carloads from gulf ports, to-wit: Mobile, Ala., New Orleans, La., Pensacola, Fla., and Port Chalmette, La., to certain destinations in Illinois, Indiana, Iowa, Kentucky, Missouri, Ohio, Tennessee, and Wisconsin; and that sugar tonnage of the Mississippi Valley Barge Line in years past has constituted 33⅓% of its total tonnage moving over and along its line and approximately 40% of its total revenues. Affiant further states that the all rail rate from New Orleans to St. Louis, as a typical example, ever since 1922 has been 50 cents per hundred pounds, which in 1932, by virtue of an order of the Commission in Exparte 103, was increased 2 cents per hundred pounds. Affiant further states that the rates proposed by the southern carries in connection with the tariffs above specifically set forth proposed a rate as typical of the rates proposed from New Orleans to St. Louis of 34 cents on 60,000 pounds minimum and 28 cents on 80,000 pounds minimum, which proposed rates include the surcharge of 2 cents per hundred pounds above specifically designated. Affiant further states that from his experi-[fol. 169] ence and that of others in connection with transportation that it is necessary in order to attract tonnage that barge rates be made lower, to-wit, differential under the all rail rates from origins to destinations, and that the Interstate Commerce Commission has recognized this principle and in Exparte 96, 99 and 102 has directed and prescribed differentials under the all rail rates of amounts in cents per hundred pounds to be determined by taking 20% of the all rail rate applicable between the two ports served by the barge line in a given movement and thus determined the differential relationship between the barge and the all rail rates.

Affidavit further states that the proposed rates were intended to meet competitive rates and that the Commission in its decision clearly indicates that the purpose of the proposed rate was to meet competitive rates via barge-truck, and affiant further states that the Commission in its decision also clearly indicates that the preponderance of tonnage will be moved on rates found justified for application in connection with the 80,000 pounds minimum.

Affiant further states that the Commission in its decision and order recognizes that the 80,000 pounds minimum rates proposed by the carriers were from five to fifteen cents lower than the cost of the barge-truck movement to Interior points, and that therefore, in approving rates four cents higher than those proposed, has approved and designated for application via rail routes rates from one to eleven cents lower than those applicable via competitive barge-truck service.

Affiant further states that representatives of the company have interviewed shippers of sugar with respect to their continued patronage and those shippers who were [fol. 170] interviewed definitely stated that they will not continue to patronize barge service, except at a substantial differential under the all-rail rates.

Affiant further states that following reports received from its representatives as to the attitude of sugar shippers, he has had compiled figures from the books of the company indicating the loss in net revenue which would have accrued on sugar moved during the period of January 1st, 1931 to July 31st, 1932 if the barge-rail rates suggested by the Commission in their order had been in effect during that period, that the amount of this loss on the sugar moved via rail-barge routes to the interior during that period would have been approximately $112,000.00.

Affiant further states that the alleged purpose of the proposed reductions was to meet the competition of contract operators on the river. The operators who were furnishing this competition at the time the reductions in rail rates were proposed have, with the exception of the American Barge Line, discontinued operations and the latter company whose service is infrequent, is now charging a rate of 25 cents from New Orleans to St. Louis on minimum lots of 450 tons and this rate does not include the loading and unloading charge and other terminal services which performed by the certificated barge lines at an average cost of 9 cents per hundredweight. Thus the cost of American Barge Line service to the shipper of sugar, New Orleans to St. Louis, would be approximately 34 cents per hundred pounds or 2 cents per hundred pounds higher than the rail rate authorized by the Interstate Commerce Commission. On sugar moved to St. Louis by the American Barge Line, destined to points beyond St. Louis, the rail rate in some cases would be as much as 20 cents per hundred pounds lower than the barge-truck rates. A fur- [fol. 171] ther important factor is that the non-certificated barge lines have no rail barge rates and consequently the sugar they move is not subject to the highly important advantage of transit privileges.

Affiant further states that the major portion of sugar moving by barge over and along the Ohio and Mississippi Rivers moved on a rate of 37 or 42 cents per hundred pounds; that this particular rate is charged by certificated barge lines having received certificates of convenience and necessity from the Interstate Commerce Commission, and that these particular rates, as typical of the character of the competitive rates which the rail lines are attempting to meet, are therefore substantially lower than the rates charged by the certificated barge lines giving regular and dependable service.

Your affiant further states that under his direction there has been computed from the books of the Mississippi Valley Barge Line the particular loss that would have resulted to said corporation in the event that it had moved the same amount of tonnage on the rates suggested for barge application by the Commission in the instant report on its port to port movement from January 1, 1931, to July 1, 1932, and that the total net loss which would have been sustained by the petitioner in the event it had moved said tonnage on said reduced rates would be approximately $120,000.00.

Your affiant further states that the same concurring carriers designated in Emerson's Tariff, I. C. C. 156 and 165, have proposed and effected drastic reductions in rates upon baggage, canned goods, coffee, corn, cotton, glassware, paper pulp, rice, soap, sugar, sulphur and tobacco either since the effective date of said supplement or approximately [fol. 172] the same date, and that the particular commodities above specifically mentioned, including sugar, constitutes substantially every commodity handled by your petitioner in excess of 1,000 tons per year, and that similar reductions on the same commodities have not been made general by the same carriers and applicable to all territories served by them.

Affiant further states that it is a matter of record and within affiant's knowledge that when water transportation has been eliminated or crippled upon the inland water-ways that rail rates immediately thereafter have been substantially increased in volume.

Affiant further states that in his opinion and from his experience in connection with transportation and traffic matters and affairs that such orders of the Commission, if allowed to stand, will eliminate river transportation upon the Ohio and Mississippi Rivers.

Affiant states that Congress in response to public demand in the Mississippi Valley has appropriated and spent within the past, and has appropriated for future expenditures more than $475,000,000.00 for the purpose of completing navigable channels adequate for reasonable, dependable and regular transportation service and terminal facilities upon and along the rivers of the Ohio. The State of Illinois alone has expended $35,000,000.00 for the improvement of the Illinois River. Municipalities and private capitals have made huge expenditures for terminal and dock facilities for the accom-odation of river-borne traffic. All of these expenditures will be rendered valueless if water transportation is eliminated.

[fols. 173-175] J. R. VAN SLYKE, being duly sworn, upon his oath states that on, to-wit, the 26th day of July, 1933, he addressed a telegram in exact words, as follows:

"Interstate Commerce Commission, Hon. P. J. Farrell, Chairman, Washington, D. C.:

Mississippi Valley Barge Line will today file a suit to enjoin order of Commission in Sugar Cases I. & S. Thirty-eight Fourteen stop District Judges away from St. Louis therefore impossible to secure interlocutory stay or order before effective dates of rates to-wit July twenty-ninth and thirty first stop Will the Commission therefore kindly change effective date of said rates so we can secure service and arrange for expedited hearing by three judge court stop Our representative leaves tomorrow to interview District Court Judge and hasten this hearing with all possible speed stop Advise by wire collect.

Thompson, Mitchell, Thompson & Young."

That thereafter and on to-wit July 26, 1933, the following telegram was received from the Interstate Commerce Commission:

"Thompson, Mitchell, Thompson & Young:

Your wire twenty sixth Commission concludes it cannot consistently comply with your request.

Farrell, Chairman."

[fols. 176-176b] Affiant further states that on or about July 25, 1933, there was prepared by him a "Motion for Rehearing And Or Reargument And Or Modification On Behalf Of Mississippi Valley Barge Line Company, Protestant in Dockets 3814, 3829 and 3837", which said motion was forwarded to the Commission according to its rules of practice and within due time, and that same was presented to the Commission in connection with its decision and order in I. & S. 3814 and associated cases, and that in said motion and in behalf of the Mississippi Valley Barge Line, protestant in the above entitled dockets, it presented to the Commission changed conditions which had resulted and obtained since the making of the record in those proceedings, and on account of said changed conditions asked the Interstate Commerce Commission to rehear said particular proceedings; that, thereafter, and on, to-wit, August 3, 1933, said motion for rehearing was by the Interstate Commerce Commission overruled. Your affiant hereto attaches a copy of said motion and specifically directs the court's attention to pages 2 and including 18, where specific statement of the allegation of changed conditions is contained in said motion.

[fol. 176c] BEFORE THE INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket 3814 and Associated Cases

Sugar from the Gulf and South Atlantic Points—Sugar Cases of 1933

MOTION FOR REHEARING AND/OR REARGUMENT AND/OR MODIFICTION ON BEHALF OF MISSISSIPPI VALLEY BARGE LINE COMPANY, PROTESTANT IN DOCKETS 3814, 3829 AND 3837

Comes now the Mississippi Valley Barge Line Company, protestant in the above designated proceedings, and moves the Commission for a rehearing and/or reargument, and/or modification in the above-entitled dockets, and for grounds for said motion alleges the following:

We apologize for the extent of this presentation. Our excuse is that the threat to protestant's venture is positive and staggering.

[fol. 176d] We courteously request careful consideration of this presentation by the entire Commission.

Protestant will consider first, changed conditions, and, second, the Commission's decision and alleged errors contained therein.

Changed Conditions

Your petitioner as grounds for rehearing, reargument and modification of the decision of the Commission, upon a rehearing would show that since the record in the above-entitled proceeding was made changed conditions have resulted and now obtain which have rendered stale the record in this proceeding and in particulars upon which the Commission has evidently based its decision, and that these particular changed conditions which this applicant will undertake to show to the Commission in the event a rehearing is granted are as follows:

1. Depression

In 1932, there was in process the most serious business depression this country, and the world at large, has ever known. The low stage has apparently passed. Prices generally have risen within the past two months, a concrete illustration being that of the commodity here involved; [fol. 176e] which in 1932 reached an all time low of $3.62½ per cwt. basis, New Orleans, and is today $4.70 basis, New Orleans. The railroads are handling a much larger volume of business today than in 1932. The cost of materials is on the increase. Under the rail co-ordinator bill the wage schedule of the rail lines has been pegged at a stationary level. We show below a tabulation of figures taken from the issue of the magazine "Business Week," dated July 15, 1933, which clearly illustrates the upturn in business and the increasing price level. We desire to point specifically to the increased carloading from 82,000 cars in the same week in 1932 to 106,000 in 1933, or an increase of 29 per cent. We also desire to point specifically to the average of prices on all commodities which increased from 59.6 to 66.6, or an increase of 12 per cent. As the effect of the National Industrial Recovery Act begins to be felt, this increase will become more rapid:

	Latest week	Year ago	Five-Year average (1928–1932)
The Business Week Weekly Index of Business Activity	*66.6	56.1	......
Production:			
Steel Ingot Operation (% of capacity)	54	16	46
Building Contracts (F. W. Dodge, daily average in thousands, 4 weeks basis)	$4,040	$4,619	$17,288
Bituminous Coal (daily average, 1,000 tons)	*1,075	678	1,252
Electric Power (millions K. W. H.)	1,539	1,342	1,500

[fol. 176f]

	Latest week	Year ago	Five-Year average (1928–1932)
Trade:			
Total Carloadings (daily average, 1,000 cars)	106	82	144
Miscellaneous and L. C. L. Carloadings (daily average, 1,000 cars)	68	59	95
Check Payments (outside N. Y. City, millions)	$3,301	$3,368	$5,626
Money in Circulation (daily average, millions)	$5,746	$5,785	$4,956
Prices (Average for the Week):			
Wheat (No. 2, hard winter, Kansas City, bu.)	$ .98	$ .45	$ .84
Cotton (middling, New York, lb.)	$ .107	$ .059	$ .139
Iron and Steel (Steel, composite, ton)	$29.67	$29.48	$33.10
Copper (electrolytic, f. o. b. refinery, lb.)	$ .087	$ .051	$ .113
All Commodities (Fisher's Index, 1926 = 100)	66.6	59.6	82.5

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* Preliminary

2. National Industrial Recovery Act

Congress at the request of the President has instructed Mr. Jos. B. Eastman as Co-ordinator of Railroads under the Industrial Recovery Act to plan for exact regulation and co-ordination of all forms of transportation, and the President has heretofore appointed a committee, in which the Cabinet, the railroads and barge line operators are represented, for the purpose of accomplishing a definite result, and this committee is now functioning with this purpose in mind. Regulation and co-ordination of various forms of transportation make unnecessary the drastic cut in rail [fol. 176g] rates here justified, and a decrease in the revenue of the rail carriers of the United States on sugar traffic of $10,000,000 per year, as established by the record in this cause.

As we read this enactment, it is intended to and will apply to essential matters involved in this hearing. The administration has passed this act, which has for its principal aim and purpose re-employment, appreciating the price of commodities and rehabilitation of business. This enactment provides means of controlling unfair competition and will essentially correct the situation applicable to 1932 in the following respects:

(a) The lake and canal lines operating between New York and lake ports have been advised by administrative authority that they come within this enactment, and they are now drawing up a code to cover their operations. When this is done, it is evident that the rates depicted by the Commission in this decision will be placed upon a definite and fair basis and will not be forced to the rock-bottom charges that were in effect during the year 1932 as a result of rate wars among themselves.

The record in this case is replete with uncertainty as to the base rate from New York to lake ports, and this uncertainty is positive throughout the entire record. The refiners have clearly indicated that the stabilization of the [fol. 176h] rates is of primary importance and that the intrinsic level of the rate is of much less consequence. Therefore, since the lake and canal lines are now making progress to stabilize this rate, then and of necessity any action of the Commission at this time justifying any particular basis of rates upon an incomplete record will result alone in the reduction of the revenues of the rail carriers. Therefore, a showing to this Commission of changed conditions, which at the time of said rehearing we respectfully suggest would positively establish such a stabilization, is ground for a rehearing of the matters presented in these proceedings. The respondents in all of these proceedings have insisted and urged that the rates from New York to the lake ports are the key rates and that the entire adjustment hinges upon these rates. It is certainly evident that if this situation is not given consideration by the Commission, then the lake and canal lines in the prescription of any rate for the future would necessarily be controlled and limited to a differential under the low basis of rates here justified by the Commission. Therefore, the rates authorized in this case, if established, must eliminate all possibility of any beneficial results from a voluntary or forced action on the part of the lake and canal lines in the adoption of their codes. Operators on the river are now working and intend to formulate a code, and what has been said with reference to the East- [fol. 176i] ern situation, therefore, applies with equal force to the rates to be applied upon the river.

(b) Press reports have positively indicated that the sugar refiners have recently allocated the production of raw sugar. This has a very definite and positive bearing upon this situation. Sugar refiners are clearly within the intent and purpose of the Industrial Recovery Act, and, therefore, will be required either voluntarily or otherwise to adopt a code, which in the future will prevent the sale practices which in the past have forced the refiners to cut their prices and glut the markets. These conditions have forced the refiners to reduce their costs and this they have attempted to accomplish principally in connection with transportation. The converse of this situation is indicated. The allocation of sugar and the stabilization of the price at reasonable figures makes the transportation cost of less significance. The matter of distribution will have been stabilized to the extent that such drastically cut rates which favor certain markets are no longer necessary.

It is positive and certain, so far as this protestant is concerned, that if it is to operate under the rates here found justified, it cannot do so except by a saving in operating expense, and from a careful survey of this situation by the executives of this company it is positive that any substantial reduction in the operating expenses will have to be ef- [fol. 176j] fected by reducing the compensation of the wage earner employes of this company. This, necessarily, is in direct contradiction of the purpose of the Industrial Recovery Act.

3. Competition

Nineteen hundred thirty-two saw certain contract operators on the river enter into the transportation of sugar. This situation has changed. The Steamer Walter Windsor made its last trip with sugar to St. Louis about nine months ago. The operations financed by Mr. Moog's company have been discontinued, and since May, 1933, this traffic has been moving by common carrier water lines and at a rate of 37 cents per hundred pounds in 500-ton lots. For the information of the Commission, in proof of this statement we quote below a telegram sent by our New Orleans representative to our general freight agent, Mr. Howe, under date of June 6, 1933, with reference to Mr. Moog's traffic:

"Godchaux want load one barge three hundred tons weekly instead five hundred tons every second week thus permitting them keep their assortments in better shape stop Will we protect thirty-seven cents on three hundred ton lots Wire quick."

The Louisiana-Texas Waterways, another former operator on the river, have discontinued, and their last tow boat [fol. 176k] in the upper river service was libelled by the crew for wages past due. The numerous contract operators mentioned in the testimony in 1932 have all gone with the exception of the American Barge Line, who three months ago advanced their rate to St. Louis from 22 cents, for a purely towing service, to 25 cents, which rate is exclusive of terminal and other incidental costs set forth in the record. This company performed towing service for only two of the refiners to St. Louis, and the service of this barge line is now so infrequent that both of these refiners are now using certificated barge line to handle a large part of their business and at rates considerably higher than the rates of the American Barge Line.

The record indicated that the barges of steel companies were the principal source of supply for the equipment of the contract carriers to effect their tow service. These steel companies, due to the improvement in their business activity, have now withdrawn said barges and tow boats from said service. Barges of similar character are now almost impossible to secure.

4. Regulation

The principal common carriers of water lines have been active in advocating regulation of water transportation by the Commission or some regulatory body and confidently [fol. 1761] expect the passage of such an enactment at the next session of Congress. This fact can be verified, and it, therefore, seems unwise and inopportune on the part of the Commission at this time to embroil all of these competitive carriers in warfare if regulation can and is to be secured and in the immediate future.

5. Clarification of the Record

The cases here involved are principally the result of investigation and suspension dockets. Such procedures allow but a short time from the date of the suspension until the hearing must be held, and as a consequence this protestant was not able to carry on a full and detailed investigation of all of the features which might have a direct bearing on this case. Since the presentation of evidence and briefs it has had an opportunity to investigate some of the features on which testimony of respondent's witnesses seem to be widely divergent from that of this protestant. It is assumed that the Commission would prefer to have actual facts, a clear record and a clear conception of the interests of all parties in order to make a fair, unbiased and just decision, and we, therefore, bring these features briefly to its attention at this time. This protestant, if given the opportunity, believes that it can show the following situations [fol. 176m] to be at variance with that indicated in the record, and that to the extent that the record has been given recognition in the Commission's findings, those findings would have differed had the situation been clearly shown.

(a) The sole witness for respondents testifying as to contract barge line operating expenses was witness Moog. The character of this operation has already been dealt with. We have shown in the preceding statement of changed conditions, that this refiner has discontinued its shipments, which, of course, changes the whole complexion of the case in so far as that testimony is concerned. However, we can show to their satisfaction that any depiction of this situation, using as the groundwork the situation as it may apply to that witness' business, would not reflect with any appreciable degree of accuracy the situation of any of the other refiners doing a major business in the same territory. If Mr. Moog will again submit to cross-examination by this protestant, it is advised and believes that it can bring to light differences existent in sales practices at that time which would lend a different aspect to the findings which might be justified on the tonnage as a whole. This protestant also believes that in the same manner it can clear up discrepancies in the variation of terminal costs cited by the two opposing witnesses.

[fol. 176n] (b) We believe that if rehearing is granted it will be possible to develop information as to the manner in which sugar is sold which will bring new light on the costs to the refiners in connection with lake or barge sugar and which will confirm to the Commission's satisfaction that the selling basis of 32 cents at Chicago, for instance, closely corresponds to these actual costs. As near as we can determine from this decision, the Commission has used an average of rates of 22 and 27 cents plus an average of 3 cents and 4 cents terminal, or 28 cents, to arrive at this key water rate.

In this opinion there is mention made of the fact that this service is only available seven months in the year. Evidence submitted showed that this service was used to accumulate a storage stock which was later distributed during the five months when the water route was closed. This storage stock is carried at an expense of at least 3½ cents to 5 cents per month per 100 pounds. The rail rate from New Orleans to Chicago found justified of 34 cents will be in force all the year. Evidence in the record shows that the ocean rail differential routes, New York to Chicago, meet this situation and apply greater differentials when navigation on the lakes is open than when it is closed. It is also to be noted that this rate of 34 cents to meet the situation at Chicago is extended back to Lexington, Ken- [fol. 176o] tucky, so that this place, several hundred miles from the Great Lakes, obtains sugar all the year on rates available at the lake ports only seven months in the year. It is highly improbable that the 34-cent figure all the year compensates the storage, terminal and other accessorial charges that are a matter of record, and for the superior rail service which is testified to by a refiner (last 10 lines, page 6), viz., that rail service was worth 10 cents per 100 pounds more than water service. The 34-cent rate from New Orleans to Chicago will provide for switch delivery at any point in the Chicago switching district and the charge therefor absorbed out of this 34-cent rate. The water rate from New York to Chicago does not include switch delivery. In F. S. A. 14080 (186 I. C. C. 526) this switching, on the water-borne sugar from New York, after reaching the dock at Chicago is shown at 2.25 cents per 100 pounds, but the evidence in these sugar cases shows a charge in excess of this. Unless full weight is given to all the conditions surrounding this key rate, i. e., the water rate from New York to Chicago, a needless sacrifice of revenue badly needed by all of the transportation agencies will follow.

(e) We believe that as to Southern rates, we can prove that the large volume of traffic to Central territory moved from New Orleans solely by virtue of the barge differential route and that had only rail service at properly related [fol. 176p] rates been available, a much smaller tonnage would have originated. We would expect to show that if the avowed purpose of the rail lines to remove barge competition is accomplished, and if properly related rates for all rail are maintained for the future, as they must eventually be, that the movement to this Central territory for the future will be considerably less than has moved barge. We would expect to show that of the four refiners located in the New Orleans district, the one moving the largest tonnage can also reach this territory from its refineries in the East, and that as to Chicago, the key point in the whole adjustment, if the lake canal lines are still able to compete with the rates here found justified, it is reasonable to assume that it will move from the East. As to the other three, we would expect to show that the volume of business done by them in Chicago is inconsequential. All of these points, if included in the record, should indicate the fallacy of an adjustment to interior points forced in an endeavor to secure tonnage to one point on which the rail lines have little, if any, chance of developing much of a movement. Much of the foregoing is vaguely recognized by the Commission in the statement shown on sheet 13 reading as follows:

> "The prosperity of respondents depends upon that of the territory they serve and sugar refining is one of the principal industries on their lines in the South. The re- [fol. 176q] finers there depend for their existence largely on their sales beyond the Ohio River and respondents accordingly desire to keep the Northern markets open to them. Incidentally, the barge lines have already done much to that end."

(d) On page 21 of the opinion the Commission find the 60,000-pound minimum rates justified. A basis for rates subject to 80,000 pounds minimum is also fixed. In connection with the 60,000-pound rates the opinion makes no mention of what the barge-rail rates or differentials should be but limit their findings as to 80,000 pounds. It is apparent that the finding is defective in this respect.

Publication of the joint barge-rail rates on sugar for application via the Mississippi Valley Barge Line has been made in the tariffs of the Southern Freight Association by Agent Emerson.

The following wire received from Chairman J. E. Tilford of the Southern Freight Association refuses to publish rates for barge-rail application for account of the Mississippi Valley Barge Line. This wire reads as follows:

"Atlanta, Ga., July 20, 1933.

P. G. Safford, M. V. B. Line, St. Louis:

Sugar rates subject minimum weight sixty thousand pounds from Gulf and South Atlantic Ports approved by [fol. 176r] Commission in I. & S. Docket 3814 are being published effective July twenty ninth Stop Existing rates Emersons Tariff published account barge lines are being continued without change Stop All rail rates subject minimum weight eighty thousand pounds being checked out and will later be published—J. E. Tilford."

In view of foregoing and in view of the materially changed circumstances protestant feels that it is entitled to withdraw the recognition of the need for some adjustment in rates conceded in its brief written when totally different circumstances prevailed. It is ready and willing to accept differentials to interior points less than the usual 20 per cent basis would afford if such differentials are fair and reasonable and based on a full and complete record in reference thereto. As to its port to port differentials on all-water movements, it believes that in the procedure under the National Industrial Recovery Act has been provided the means whereby the major lines on the rivers may enter into an agreement to maintain a reasonable differential, and it is agreeable to the proposition that the Commission may act as the adjudicator in a discussion of this question between barge lines and competitive rail lines. We, therefore, propose that inasmuch as the spread between the 60,000-pound rate and the 80,000-pound rates [fol. 176s] authorized is a very narrow one, being only 2 cents on the ports and 5 cents on the interior, and that with a showing indicating such wide disparities between the rates necessary and those authorized for 80,000-pound rates as to also embrace the 60,000-pound rates, that the Commission give reconsideration to the intrinsic levels of such 60,000-pound rates with the view to preserving the revenues of all carriers and eliminating at least portions of the needless reductions authorized in this case. While we are not a protestant in either the Transcontinental or Western Trunk Line Fourth Section cases, since those decisions have obviously been rendered because of the decisions in the cases in which we are a protestant, we respectfully suggest that if the decisions in the cases in which we are a protestant are further delayed to enable a rehearing to be held that the authorization of that fourth section relief be likewise held in abeyance.

As another changed condition, this protestant calls the attention of the Commission to the fact that since the taking of testimony in this case drastic reductions have been made in the rates on commodities in addition to those which were cited in evidence. If the sugar rates found justified herein are established, a situation will have been created by the rail lines wherein they have reduced very materially the rates on 60 per cent of the total tonnage which in the [fols. 176t-176yy & 177] past has moved by barge line. A list of these commodities is as follows: Bagging, canned goods, coffee, corn, cotton, glassware, paper, pulp, rice, soap, sugar, sulphur, tobacco.

This statement affirms and makes emphatic the statement of protestant. The barge line cannot continue as a profitable venture under rates which the rail lines have been permitted to publish and put in effect, and by the same token efficient rail service cannot be assured by these substantial reductions in the revenue of the railroads.

[fol. 178] J. D. Beeler, first being sworn, states that he is and has been since 1930, Vice President and General Manager of the Mead Johnson Terminal Corporation, incorporated under the laws of the State of Indiana and authorized under its charter to do a business of operating a River-Rail Terminal and Warehouse, its principal function being the transfer of freight from river barges to cars or vice versa. Affiant further states that the Mead Johnson Terminal Corporation was incorporated on June 27, 1930, that it has $561,000.00 in capital stock outstanding fully paid up, and that it has invested in Terminal properties on the river front at Evansville, Indiana the sum of $550,000.00.

Affiant further states that the promotion of this enterprise and the investment in this property was undertaken in reliance on the continued operation of water transportation by barge between the City of Evansville and points on [fol. 179] the Mississippi and Ohio Rivers. Affiant further states that reliance on continued operation of such water service via barge was inspired by faith in effectiveness of the Enactment of Congress designated as Section 500 of the Transportation Act. Affiant further states that the principal value of this facility aforesaid is for and in connection with traffic which has been water borne, and that if operations of barge lines between Evansville and points on the Mississippi and Ohio Rivers are discontinued, it will have the result of materially decreasing the utility of its facilities. Affiant further states that since the completion of the construction of its facilities under date of January, 1931, approximately 66 per cent of its revenues have been derived from freight traffic which has been water borne to, from or via its terminal aforesaid.

Affiant further states he is familiar with the reductions in the sugar rates proposed by the rail carriers and published by Agent W. P. Emerson, acting under Powers of Attorney from said rail carriers, in his tariffs Nos. 10-B, I. C. C. 165, Supplement 48, and 1-H, I. C. C. 156, Supplement 54, and affiant further states that after said reduced rates were suspended by the Order of the Interstate Commerce Commission under Docket I. & S. 3814, his company applied for and was granted permission to intervene in the proceedings in opposition to the said proposed rates.

Affiant further states that since the completion of construction of its facilities his company has handled a total of 59,997 tons of sugar received from barge lines of which a total of 22,608 tons were stored in transit for varying periods in its warehouse facilities. Affiant further states that the bulk of the sugar so stored in its warehouse facili- [fol. 180] ties was stored in transit under authority of Mississippi Valley Barge Line Company's I. C. C. No. 10, and that the traffic was subsequently moved to points beyond Evansville at through rail-barge rates named in Agent Emerson's tariffs I. C. C. Nos. 156 and 165. Affiant further states that if the privilege of storage in transit on through rates lower than rail rates were to be withdrawn, his company will suffer a very material loss in both tonnage handled and tonnage stored, by reason of such withdrawal.

Affiant further states that in his endeavor to secure business for his facilities in connection with the water service it has been his unvarying experience that unless the cost to the shipper by use of the water route was less than the cost of the comparable transportation service via rail, the shipper would not use the water route. Affiant further states that the present barge-rail rates applicable on sugar via the Mississippi Valley Barge Line Company in connection with rail lines via Evansville, Indiana, over his facilities, thence rail lines to points beyond, are on a materially higher basis than the rates which the Interstate Commerce Commission has authorized the rail carriers to publish from New Orleans to certain of the same destinations, principally in the states of Illinois, Indiana and Wisconsin.

Affiant further states that in the past the movement of sugars on these barge-rail rates, which in the past have been 10 cents per 100 pounds lower than the all-rail rates, has been principally to destinations to which the all-rail rates are now lower than the barge-rail rates. Affiant has interviewed shippers who have used the barge-rail route via Evansville and has uniformly been advised that unless the rates via barge-rail are reduced to a basis reflecting a substantial differential under the all-rail rates authorized [fol. 181] by the Commission in I. & S. Docket 3814, that no further movements via barge route will be made.

Affiant further states that in pursuance of his investigation with the shippers of sugar he has conferred with the management of the Mississippi Valley Barge Line Company and has been advised that no reduced rates for application via barge-rail service will be made reflecting such differentials under the all-rail rates resulting from the Commission's decision in I. & S. 3814. Affiant further states that since the commencement of the operation of his company, it has lost a considerable volume of tonnage and a considerable amount of revenue by reason of the inability of the said Mississippi Valley Barge Line Company to meet rates of the rail carriers on other traffic which have been reduced for the purpose of eliminating water transportation. Affiant cites as a notable example of such losses, the item of coffee imported via New Orleans, which formerly moved via barge to Evansville, over his company's facilities, thence to destinations on rail lines beyond, at rates lower than the corresponding all-rail rates in effect at that time to the extent of 10¢ per 100 pounds. Affiant states that on September 18, 1932 the rail rates on this traffic were reduced to meet water competition to the extent of 17 cents to Chicago, as an example, and that thereafter the Mississippi Valley Barge Line Company was unable to maintain barge-rail rates differentially under the rail rates and that as a consequence the movement of this traffic was lost to the route via his company's facility.

Prior to that time, during the period of its operations, the Mead Johnson Terminal Corporation had handled 6,712 tons of this traffic. Affiant states that he has every [fol. 182] reason to believe that in like manner the large volume of sugar which was formerly handled and stored in his company's facilities will be lost to it, and that the resultant loss of revenues, together with losses already sustained, cannot do otherwise than have the effect of rendering its enterprises an unprofitable venture, which must in turn render the value of its facilities of questionable future worth.

Affiant, M. L. COSTLEY, being first duly sworn, states on oath that he is Assistant Traffic Manager of the Illinois Central Railroad Company at New Orleans, Louisiana, that he has been engaged in rate and traffic work with the Illinois Central Railroad Company at New Orleans, Louisiana, for thirty years, that the most southerly terminus of the Illinois Central Railroad Company is at New Orleans, Louisiana, and that the Illinois Central Railroad Company has lines of railroad that extend from New Orleans Louisiana, to ports on the Mississippi, Ohio, and Illinois Rivers, such as Memphis, Tennessee, Evansville, Indiana, Louisville, Kentucky, St. Louis, Missouri, Joliet, Illinois, and Chicago, Illinois.

Affiant states that it is a part of his duty as such Assistant Traffic Manager of the Illinois Central Railroad Company, to keep himself informed and to know the tonnages of the various commodities that are available for shipment from New Orleans, Louisiana to points in the North, including the tonnage in sugar, and that there has been and is exceedingly keen competition between the carriers reaching New Orleans, Louisiana, including not only the rail carriers but the carriers operating barges on the Mississippi River from New Orleans, Louisiana, to points in the North, for [fol. 183] the transportation of sugar from the refineries located in the New Orleans district.

Affiant further states that he testified on October 25, 1932, at the hearing held by the Interstate Commerce Commission at Washington, D. C. in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, and that he dealt in his testimony with the competition which the Illinois Central Railroad Company encounters with the operators of contract barges and barges operating under certificates of public convenience and necessity given by the Interstate Commerce Commission for the movement of sugar from New Orleans, Louisiana to points in the North.

Affiant further states that since the date of the hearing in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, he has been continuously located in New Orleans, Louisiana, and has been in constant and close touch with the competition between the rail carriers on the one hand, including the Illinois Central Railroad Company, and the barge lines on the other, for the movement of sugar from New Orleans, Louisiana, as his duties require him to be, that the competition of the contract barge lines has not disappeared, that the competition which was presented by him in his testimony in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, has not changed, and that the situation with respect to the competition of the rail carriers on the one hand, including the Illinois Central Railroad Company, and the barge lines on the other, is the same as it was at the time I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, was heard by the Interstate Commerce Commission.

Affiant further states that the following shipments have been made by contract barges operating from New Orleans, [fol. 184] Louisiana, to points in the North from November 1, 1932 to July 31, 1933, that affiant has included among the contract barges companies a certificated carrier, the American Barge Line Company, for the reason that the American Barge Line Company from affiant's knowledge and experience is more properly classifiable as a contract barge company, performing, as it does to a large extent, mere towage service at rates that are substantially less than the rates charged by other certificated barge companies, such as the Federal Barge Line and the Mississippi Valley Barge Line Company:

Shipments Made by Colonial Sugar Company from Gramercy, Louisiana

Barge line	Destination	Tons
American Barge Line Co.	Evansville, Ind	2,470
" " " "	Cincinnati, Ohio	1,323
" " " "	Louisville, Ky	400
		4193

Shipments Made by C. & H. Sugar Company from New Orleans, Louisiana

Barge line	Destination	Tons	
American Barge Line Co.	St. Louis, Mo	33,889	33,889

Shipments Made by Savannah Sugar Refining Company from New Orleans, Louisiana, ex Savannah, Georgia

Barge line	Destination	Tons	
American Barge Line Co.	Ohio River Points	10,000	10,000

Shipments Made by American Sugar Refining Company from New Orleans, Louisiana

Barge line	Destination	Tons	
Steamer Althea	Mobile, Ala	1,735	
Tenn. Belle	Vicksburg, Miss	164	
" " "	Natchez, "	103	
" " "	Greenville, "	90	
" " "	Monroe, La	769	
" Kurzweg	Morgan City, La	110	
		2,971	2,971
Forwarded		2,971	51,053

[fol. 185]

Barge line	Destination	Tons	
Brought Forward		2,971	51,053
Steamer Kurzweg	New Orleans, La	350	
" Interstate	New Iberia, La	1,164	
Commercial Transfer Co	Monroe, "	238	
Haynes & Boyle Barge	" "	40	
John I. Hay Barge	Calion, Ark	3,951	
" " " "	Camden, "	1,181	
" " " "	St. Louis, Mo	506	
American Barge Line Co.	" " "	3,313	
" " " "	Cincinnati, Ohio	453	
			11,196

Shipments Made by William Henderson from New Orleans, Louisiana

Barge line	Destination	Tons	
John I. Hay Barge	Calion and Camden, Ark	3,860	
La. Texas Waterways Corp.	Calion, Ark	302	
American Barge Line Co.	Louisville, Ky	1,245	
			5,407

Shipments Made by Sterling Sugars Company, from Franklin, Louisiana

Barge line	Destination	Tons	
La. Texas Waterways Corp.	Calion, Ark	450	
" " " "	Huntington, W. Va	1,100	
" " " "	Cincinnati, Ohio	1,850	
" " " "	Louisville, Ky	3,350	
American Barge Line Co.	Portsmouth, Ohio	925	
" " " "	Huntingtln, W. Va	825	
" " " "	St. Louis, Mo	1,000	
" " " "	Lexington, Ky	450	
" " " "	Cincinnati, Ohio	1,440	
" " " "	Louisville, Ky	3,750	
Banner Barge Line	Portsmouth, Ohio	425	
" " "	Huntington, W. Va	425	
			16,190
Forwarded			83,846

[fol. 186]

Brought Forward 83,846

Shipments Made by Godchaux Sugars, Inc., from Reserve, Louisiana

Barge line	Destination	Tons	
Commercial Transfer Co.	Monroe, La.	1,144	
“ “ “	Ruston, “	63	
John I. Hay Barge	St. Louis, Mo	1,070	
“ “ “ “	Monroe, La.	94	
“ “ “ “	Pine Bluff, Ark.	71	
“ “ “ “	Camden, “	207	
“ “ “ “	Calion, “	400	
Haynes & Boyle Barge	Monroe, La	45	
Steamer Tenn. Belle	“ “	232	
“ “ “	Camden, Ark	80	
“ “ “	Vicksburg, Miss	71	
La. Texas Waterways Corp.	St. Louis, Mo	4,932	
“ “ “ “	Louisville, Ky	1,328	
“ “ “ “	Evansville, Ind	478	
American Barge Line Co.	Louisville, Ky	1,206	
“ “ “ “	Evansville, Ind	478	
Godchaux Sugars, Inc. (Carnegie Barges)	St. Louis, Mo	2,230	
Banner Barge Line	“ “ “	1,155	
			15,284
			99,130

Affiant further states that Godchaux Sugars, Inc., made the following shipments of sugar by contract barges from Reserve, Louisiana, in July, 1933:

Barge line	Date	Destination	Pounds
Banner Barge Line	July 22, 1933	St. Louis, Mo	1,211,000
“ “ “	“ 23 “	“ “ “	1,107,250
John I. Hay Barge	“ 8, “	“ “ “	462,488
“ “ “ “	“ 8, “	“ “ “	1,678,354

[fol. 187] Affiant further states that the American Sugar Refining Company made the following shipments of sugar by contract barges from New Orleans, Louisiana, in July, 1933:

Barge line	Date	Destination	Pounds
John I. Hay Barge	July 6, 1933	St. Louis, Mo	142,725
“ “ “ “	“ 6, “	“ “ “	504,650
“ “ “ “	“ 6, “	“ “ “	201,350
“ “ “ “	“ 6, “	“ “ “	60,600
“ “ “ “	“ 6, “	“ “ “	103,425

Affiant further states that the rate paid by the American Sugar Refining Company on shipments of sugar that moved from New Orleans, Louisiana, by contract barges on July 6, 1933, to St. Louis, Missouri, was 20 cents per 100 pounds.

Affiant further states that the American Barge Line Company is transporting sugar to St. Louis, Missouri, at from 20 to 24 cents per 100 pounds.

Affiant further states that shippers of sugar at New Orleans, Louisiana, have been and are today being solicited by contract barge operators for shipments of sugar to St. Louis, Missouri, that the costs of moving sugar from New Orleans, Louisiana, to St. Louis, Missouri, as testified to before the Interstate Commerce Commission at the hearing in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, and the costs at the present time are not different, and that the situation with respect to competition with contract barges and with certificated barges is not different from that which existed at the time of the hearing in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points.

J. L. Sheppard, being first duly sworn, states on oath that he is General Freight Agent of the Illinois Central [fol. 188] Railroad Company at Chicago, Illinois, that he has been engaged in rate and traffic work for the Illinois Central Railroad Company for upwards of thirty-seven years and that he has direct supervision and charge of the publication of freight rates that apply on commodities shipped over the lines of railroad of the Illinois Central Railroad Company.

Affiant states that the rates applying on sugar shipped from New Orleans, Louisiana, to various points in the Southwest and the North which took effect on July 29, 1933 and July 31, 1933, which rates were published following the decision of the Interstate Commerce Commission in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, and I. & S. Docket No. 3837, Sugar from New Orleans to Arkansas, Missouri and Oklahoma, are not in violation of Section 4 of the Interstate Commerce Act, and that departure from Section 4 referred to in Section 17 of the amended petition filed by the Mississippi Valley Barge Line Company against the United States of America and the Interstate Commerce Commission in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, is protected by Fourth Section Order No. 7542 issued by the

Interstate Commerce Commission, that any departures from Section 4 that may exist in the adjustment of sugar rates from New Orleans, Louisiana, are all protected by the said order of the Interstate Commerce Commission, and that the rates from New Orleans, Louisiana, are not therefore unlawful and void.

Fourth Section Order of the Interstate Commerce Commission, No. 7542

(To be copied by Clerk from said fourth section order as presented to the three-judge court.)

[fol. 189] Order—Filed Aug. 24, 1933

At a General Session of the INTERSTATE COMMERCE COMMISSION, Held at Its Office in Washington, D. C., on the 2nd Day of November, A. D. 1925

No. 9702

Memphis Southwestern Investigation

Supplemental Fourth Section Order No. 7542

Rates Between Mississippi River Points

It appearing, That by order dated July 1, 1925, the Commission reopened this proceeding for further hearing and investigation in connection with the rates on classes and commodities between St. Louis, Mo., Memphis, Tenn., New Orleans, La. and other Mississippi River Crossings, and points taking the same rates or rates made with relation thereto, via routes operating west of the Mississippi River; and full investigation of the matters and things involved therein having been had, and for good cause shown:

It is ordered, That Fourth Section Order No. 7542 entered in the above entitled proceeding December 2, 1919, as amended from time to time, be and the same is hereby, further amended as follows:

It is ordered, That carriers parties to the above-numbered *and* applications and other carriers respondents in Memphis-Southwestern Investigation operating routes west of the Mississippi River, according as they participate in the transportation via the following routes:

1. Via the line of the Missouri Pacific Railroad from St. Louis through Poplar Bluff to Paragould; thence via the line of the St. Louis-Southwestern Railway Co. from St. Louis through Brinkley to Fordyce, Arkansas; thence via the line of the Chicago, Rock Island & Pacific Railway Company through El Dorado, Arkansas and Ruston and Winfield, Louisiana to Alexandria, Louisiana; thence via the line of Morgan's Louisiana & Texas Railroad and Steamship Company, via La Fayette, to New Orleans, Louisiana, and their respective connections east of the above described line from St. Louis to New Orleans.

2. Via other routes of the respondents operating exclusively east of the above-described line from St. Louis to New Orleans whose rates are now higher than the rates via the east-side lines between the points hereinafter described—

be, and they are hereby, authorized to establish and maintain between St. Louis, Mo., Memphis, Tenn., Helena, Ark., Vicksburg and Natchez, Miss., and Baton Rouge and New Orleans, La, and points grouped therewith taking the same rates, and between Memphis, Tenn. and Mississippi River Crossings south thereof and points grouped therewith taking the same rates, on the one hand, and points north and east of St. Louis, Mo. and the Mississippi River and on and north of the Ohio River to and from which rates are made with relation to or based on the rates to and from St. Louis, on the other, rates on classes and com- [fol. 190] modities, except fertilizer and grain and grain products, not lower than the present rates between the same points via carriers operating east of the Mississippi River, provided that present rates at the said intermediate points shall not be increased except as authorized by this commission and shall in no instance exceed the lowest combination.

It is further ordered, That except as amended above, or as amended by supplemental fourth section orders entered herein from time to time not in conflict with the relief herein authorized and the said Fourth Section Order 7542, entered December 2, 1919, in the above-entitled proceeding, shall remain in full force and effect.

By the commissioner.

George B. McGinty, Secretary. (Seal.)

[fols. 191 & 192] IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE

On this 31st day of January, 1934, the foregoing statement of evidence having been lodged with the Court on the 16 day of January, 1934, and the Court being advised that said petitioner (appellant) did, on the 18th day of January, 1934, advise the defendants (appellees of the lodgment of same in this court, did furnish the defendants (appellees) with a true copy thereof on said date, and did advise said defendants (appellees) that it would ask this Court to approve of same on the 31st day of January, 1934, and no objections having been entered to same by said defendants (appellees) or any of them, the same is hereby approved and ordered filed as a "Statement of the Evidence" to be included in the record of appeal in the above styled and numbered cause as provided by rules of court.

(Signed) Charles B. Davis, District Judge.

Approved by:

(Sig.) E. M. Reidy, for U. S. and I. C. C. Elmer A. Smith, for all Interveners.

[fol. 193] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed March 5, 1934

To Honorable Charles Elmore Cropley, Clerk:

Pursuant to Paragraph 9, Rule 13, Revised Rules of the Supreme Court of the United States, appellant here submits the following statement of the points upon which it intends to rely in its appeal to the Supreme Court of the United States:

1. That the decision of the Interstate Commerce Commission, its I. & S. Docket 3814, is contrary to law since by exact findings and specific inferences it admits and sanctions:

(a) A violation of Section 500 of the Transportation Act of 1920 (U. S. Code, Title 49, Sec. 142—41 Stat. L. 499);

(b) A violation of the Anti-Trust Laws—(U. S. Code, Title 15, Secs. 1; 2—26 Stat. 209);

(c) A violation of Sections 1, 2, 3 and 4 of the Interstate Commerce Act, (U. S. Code, Title 49, Secs. 1, 2, 3, 4; 24 Stat. 379, 380).

2. That the Interstate Commerce Commission, in failing to grant appellant's Motion, timely filed, for a rehearing of the Commission's I. & S. Docket 3814, was a denial of a right in the appellant.

[fol. 194] 3. That the appellant has a legal interest and right to maintain this suit to annul and set aside the orders of the Interstate Commerce Commission. (District Court Jurisdictional Act, Sec. 41, Par. 28—U. S. Code, Title 28, Sec. 41 (28); 36 Stat. 539.)

4. The matters presented in this suit and appeal are not moot.

5. The Court below and this Court upon appeal has jurisdiction to set aside and annul the orders of the Interstate Commerce Commission brought in issue in this proceeding. (District Court Jurisdictional Act, Sec. 41, Par. 28—U. S. Code, Title 28, Sec. 41 (28); 36 Stat. 539.)

6. The orders of the Interstate Commerce Commission here complained of violate the declared policy of Congress.

7. That the final decree of the three-judge court dismissing appellant's appeal was erroneous and contrary to law.

The appellant here indicates the parts of the record which it thinks necessary for the consideration of the particular matters presented above:

(a) Statement of Basis of Appellate Jurisdiction, Folio pages 1, 2, 3.

(b) Citation, Folio pages 5, 6.

(c) Amended Petition, Folio page 8 to and including page 32.

(d) Exhibit B, Decision of the Interstate Commerce Commission, Folio page 34 to and including page 63.

[fol. 195] (e) Original Order of the Commission dated July 3, 1932, Folio pages 64 and 65.

(f) Amended Order of the Commission under date of July 18, 1933, Folio page 66.

(g) Answer of the United States of America to petition and amended petition, Folio page 67 to and including page 73.

(h) Answer of Interstate Commerce Commission to amended petition, Folio page 74 to and including page 85.

(i) Intervening Petition of Illinois Central Railroad Company, et al., Folio page 86.

(j) Answer of Interveners, Illinois Central Railroad Company, et al., Folio page 87 to and including page 100.

(k) Appellant's Supplemental Petition, Folio pages 101 and 102.

(l) Decision of Honorable John B. Sanborn, Circuit Judge, Honorable Charles B. Davis, District Judge, and Honorable Charles B. Faris, District Judge, Folio page 103 to and including page 108.

(m) The Findings of Fact and Conclusions of Law as given by the three-judge court, Folio page 109 to and including page 116.

(n) Final Decree of said three-judge court, Folio page 117.

(o) Appellant's Petition for Appeal, Folio pages 118 and 119.

(p) Appellant's Assignment of Errors, Folio page 120 to and including page 131.

[fol. 196] (q) Order of Court Allowing Appeal, Folio pages 132, 133.

(r) Appellant's Bond on Appeal approved by Judge of the United States District Court, Folio pages 134, 135.

(s) Præcipe on Appeal, Folio page 136 to and including page 138.

(t) Certificate of District Judge as to question of finding of fact and declaration of law in behalf of appellant, Folio page 139.

(u) Appellant's Requested Finding of Fact, Folio page 140 to and including page 149.

(v) Appellant's Requested Declaration of Law, Folio page 150 to and including page 153.

(w) Appellant's Statement of Evidence, To Be Incorporated In The Record, Folio page 154 to last paragraph on page 162; then from Folio page 164 to and including portion of page 173 ending with the words "Farrell, Chairman"; then beginning on Folio page 176 with the words "Affiant further states", down to the concluding portion of the same paragraph on the same page ending with the words "Allegation of changed condition is contained in said motion"; then the portion of the printed Motion for Rehearing and/or Reargument attached to Folio page 177 of the transcript, to-wit, from page 1 to and including that portion of the printed page 18 ending with the words "the revenue of the railroads" down to heading "The Commission's decision and alleged errors contained therein." Also Folio page 178 to and including Folio page 191.

Respectfully submitted, Truman P. Young, Counsel for the Appellant.

[fol. 197] [File endorsement omitted.]

Endorsed on cover: File No. 38,410. E. Missouri, D. C. U. S. Term No. 807. Mississippi Valley Barge Line Company, Appellant, vs. The United States of America, Interstate Commerce Commission, Illinois Central Railroad Company et al. Filed February 23, 1934. File No. 807, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 807

MISSISSIPPI VALLEY BARGE LINE COMPANY,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS.

STATEMENT OF BASIS OF APPELLATE JURISDICTION.

Pursuant to Supreme Court Rule 12, Paragraph 1, the above petitioner (appellant) files this, its statement, showing the basis on which said petitioner (appellant) contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the decree appealed from herein, as follows:

I.

The statute believed to sustain the appellate jurisdiction is the Act of October 22, 1913, Chapter 32, 38 Statute

220 (now Section 47 a, Title 28, United States Code), which provides that an appeal from a final decree of a three judge Court (in suits brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission) may be reviewed by the Supreme Court of the United States, if appeal to the Supreme Court be taken by the aggrieved party within sixty days after the entry of the final judgment or decree, such appeals to be taken in like manner as appeals are taken under existing law or in equity cases.

II.

The decree appealed from was entered on the 21st day of November, 1933.

III.

The application for an appeal was presented on the 16th day of January, 1934.

IV.

The appeal herein is from a final decree of a three-judge Court in a suit in equity to set aside, annul and suspend an order of the Interstate Commerce Commission, its docket I. & S. 3814. In said suit the Mississippi Valley Barge Line Company, a corporation, was plaintiff, The United States of America and the Interstate Commerce Commission were defendants, and Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, and New Orleans and Northeastern Railroad Company were interveners. The three-judge Court entered a final decree therein on November 21, 1933, dismissing the plaintiff's petition, and thereafter petitioner took an appeal to the Supreme Court of the United

States which was duly allowed on the 16th day of January, 1934.

V.

The following cases are believed to sustain the jurisdiction of the Supreme Court:

Chicago Junction Cases, 264 U. S. 258;

Alton Railroad Company v. *United States*, 287 U. S. 229;

Intermountain Rate Case, 234 U. S. 476;

United States v. *New River Co.*, 265 U. S. 533.

WHEREFORE, your petitioner respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

(Signed) TRUMAN P. YOUNG,
(Signed) J. R. VAN SLYKE,
Counsel for Petitioner.

FILE COPY

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation,
Appellant (Petitioner),
vs.
THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees (Defendants),
and
ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY and NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,
Appellees (Interveners).

No. 807.

Appeal from the District Court of the United States for Eastern Division of Eastern Judicial District of Missouri.

BRIEF OF APPELLANT.

GUY A. THOMPSON,
TRUMAN P. YOUNG,
J. R. VAN SLYKE,
Attorneys for Appellant.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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MISSISSIPPI VALLEY BARGE LINE COMPANY,
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Appellees (Interveners).

No. 807.

Appeal from the District Court of the United States for Eastern Division of Eastern Judicial District of Missouri.

BRIEF OF APPELLANT.

REFERENCE TO OPINIONS BELOW.

The decision and orders of the Interstate Commerce Commission brought in issue in this proceeding are its Investigation and Suspension Docket (I. & S.) 3814, 195 I. C. C. 127.

This is an appeal from a final decree of a three-judge court, Honorable John B. Sanborn, Circuit Judge; Honorable Charles B. Faris, District Judge, and Honorable Charles B. Davis, District Judge, and is now reported in 4 F. Supp. 745.

STATEMENT OF THE CASE.

THE FACTS UNDER WHICH THIS LITIGATION ARISES.

The Mississippi Valley Barge Line Company is a Delaware corporation, owning and operating a barge line from New Orleans to ports Cincinnati, Ohio, and St. Louis, Missouri, and intermediate ports upon the Ohio and Mississippi Rivers, and having an investment in towboats, barges, erected and leased terminals in the total sum of $3,498,693.11.

Said corporation, in conformity with law and as a common carrier of freight under its charter, applied to the Interstate Commerce Commission for a certificate of convenience and necessity, Ex parte 99, 167 I. C. C. 41 (R. 137), and after public hearing said Commission, on July 11, 1930, issued a certificate of public convenience and necessity to this appellant and in said order stated:

> "We find that the present and future public convenience and necessity require the operation of Mississippi Valley Barge Line Company as a common carrier by water upon the Mississippi and Ohio Rivers between Cincinnati and New Orleans."

Thereafter, upon supplemental application, the Interstate Commerce Commission issued a further order (R. 137), in which it found that the present and future public convenience and necessity required the operation of Mississippi Valley Barge Line Company as a common carrier on the Mississippi River between New Orleans and St. Louis and intermediate points (182 I. C. C. 512).

This appellant, since October, 1930, has operated as a common carrier of interstate traffic over and along the Ohio and Mississippi Rivers upon regular schedules and with dependable service.

In 1932 the Southern carriers, including the intervening railways, through their executives and by concerted action, authorized their publishing agent, Mr. Emerson, to prepare, publish and file with the Interstate Commerce Commission certain tariffs, to wit, I. C. C. 156 and I. C. C. 165, which would effect radical reductions in rail rates on refined sugar, carload, minimums of 60,000 and 80,000 pounds, from Gulf ports Mobile, Alabama; New Orleans and Port Chalmette, Louisiana, and Pensacola, Florida, to certain destinations in the States of Illinois, Indiana, Kentucky, Iowa, Missouri, Ohio, Tennessee and Wisconsin (R. 130, 131). These tariffs so prepared and presented to the Interstate Commerce Commission would have become effective upon thirty days notice to the Commission and to the public (Sec. 6 [3], Interstate Commerce Act), to wit, on October 1, 1932, except that said rates were protested by various interested parties, including this appellant

(R. 131). The Interstate Commerce Commission, in response to said protests, suspended the effective date of said rates, entered its order of investigation under Investigation and Suspension Docket 3814, and designated said docket "Sugar Rates From the Gulf Ports" (R. 19). Hearings were had, the cause was briefed and argued before the Commission by various interested parties (R. 20, 21), and the Commission entered its report and original order July 3, 1933, and released same under date of July 7, 1933 (R. 131). In said order it was provided:

> "* * * that the Commission has, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof" (R. 64).

In said order of July 3, 1933, the Commission found justified the proposed rates of rail lines presented by Emerson's Supplement No. 54 to Tariff No. 1-4, I. C. C. 156, and Supplement No. 48 to Tariff No. 10-B, I. C. C. 165, upon the 60,000-pound minimum. The Commission found that the proposed rates contained in said tariffs on the 80,000-pound minimum were not justified and ordered said schedule of rates to be canceled, but authorized rates 4 cents per 100 pounds higher than proposed by the rail lines (R. 50).

In order that the Court may have the exact situation, the following tabulation sets forth the matters above detailed and gives the former rail rate, the rates proposed under the new tariffs, and the rates authorized by the Commission. In this tabulation we have used the rate on 80,000-pound minimum as, under the record in this case, this is the rate that will carry by far the greater portion of the tonnage, and have used New Orleans as an origin point and Chicago and St. Louis as typical destinations because, under the Commission's decision, these particular destinations are recognized as the primary market for sugar:

From	To	Former Rate	Proposed Rate	Rate Authorized by the Commission
New Orleans	Chicago	56 cents	30 cents	34 cents
	St. Louis	52 cents	28 cents	32 cents

In its order of July 3, 1933, the Commission permitted the rail lines to put into effect upon one day's notice the rates approved or authorized therein. By an amended order released on July 18, 1933, the Commission, with respect to the rates approved on the 60,000-pound minimum, permitted the rail lines to make said rates effective July 29, 1933, upon five days notice. With respect to the rates designated upon the 80,000-pound minimum the Commission authorized the rail lines to make effective

> "* * * the rates approved in the report referred to and made a part hereof upon notice to this Commission and to the general public by not less than five days filing and posting in the manner prescribed in Section 5 of the Interstate Commerce Act, but not earlier than July 29, 1933" (R. 67, 68).

Appellant, under date of July 25, 1933, forwarded to the Interstate Commerce Commission a motion for rehearing and/or reargument in said cause (R. 143), and in its motion alleged changed conditions since the making of the record in the proceeding. This motion was denied by the Commission on August 3, 1933 (R. 143).

On July 26, 1933, the appellant, contemplating a suit to set aside the orders of the Commission, requested the Commission to postpone the effective date of the new rates so that a three-judge court could be convened and give consideration to an interlocutory order (R. 142). This request was denied on the same day (R. 142).

The present suit was filed by the Mississippi Valley Barge Line Company as petitioner in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri (R. 1) (Act of Congress June 18, 1910, c. 309, Sec. 1, 36 Stat. 539, as amended March 3, 1911, c. 231, 207, 36 Stat. 1148, and October 22, 1913, Chap. 32, 38 Stat. 219; U. S. Code, Title 28, Par. 41 [28]). As instituted, the United States of America and Interstate Commerce Commission were the only defendants (Act of Cong. June 18, 1910, c. 309, Sec. 3, 36 Stat. 542, as amended March 3, 1911, c. 231, Sec. 208, 36 Stat. 1149; U. S. Code, Title 28, Par. 46).

The original bill set forth the matters hereinafter specifically detailed, and after the denial of appellant's motion addressed to the Interstate Commerce Commission for reargument and/or rehearing, an amended bill was prepared and by leave of Court filed (R. 1-19), and, in addition to the matters contained in the original bill, set forth that said motion alleged changed conditions which had obtained since the making of the record in I. & S. 3814, and that a denial by the Commission of said motion was a denial of a right guaranteed to this appellant.

On August 15, 1933, a three-judge court was formed and convened at St. Paul, Minnesota, under proper application and notice, and at said time the United States of America and the Interstate Commerce Commission, by attorneys, appeared and filed answers (R. 68-80). At this time the rail lines, designated in the caption as interveners, entered their voluntary appearance in said cause under federal statute (Act of Cong. June 18, 1910, c. 309, Sec. 5, 36 Stat. 543, as amended; U. S. Code, Title 28, Sec. 45-A) and filed their answer (R. 81-92). Thereupon appellant, by leave of Court first had, filed a supplemental petition (R. 92, 93), wherein appellant prayed that interveners, having submitted themselves to the jurisdiction of the Court, be enjoined from assessing, collecting or charging the rates on sugar authorized in the Commission's report and orders.

THE INTERSTATE COMMERCE COMMISSION'S REPORT AND ORDERS.

The Commission in its report (decision) (R. 19, 35-50) specifically found:

That the proceedings involved a "contest among railroad, water and motor truck carriers for that great volume of carload sugar traffic which moves from * * * Louisiana cane sugar refining points * * * to Central territory and certain Middle-Western points, and particularly to Chicago, Illinois, the country's largest market'' (R. 21).

That ''rail carriers * * * are here seeking * * * drastic, sweeping and quick reductions in rates. They are doing so with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent. If the proposed reductions do not have the desired result and revenues from sugar go still lower, the rail carriers expect to console themselves with the thought that the present rates, if continued, would cause them even greater losses. In other words, they are willing to make these reductions rather than run the risk of the further losses which continued maintenance of the existing rate might entail. * * * They may consider even lower rates if those proposed are established and do not prove sufficiently effective'' (R. 22).

That the all-rail rate at the time of the hearing from New Orleans to Chicago on this traffic was 56 cents per 100 pounds for a distance of 912 miles; that the proposed rate for all-rail lines on 80,000-pound minimum is 30 cents per 100 pounds (R. 38).

That ''the lower rates would be used on most all the traffic'' (R. 38).

That ''no reductions are proposed in the standard barge or barge-rail rates from Louisiana points to the destinations considered * * *'' (R. 38).

That the proposed 30-cent rate to Chicago is "blanketed back over direct routes almost as far south as St. Louis and over indirect routes via Louisville and Cincinnati almost into Tennessee * * * the 28-cent rate to St. Louis * * * is blanketed back into Kentucky and Tennessee * * * until it meets the present existing lower rates in points in Western Tennessee and Northern Mississippi, Alabama and Georgia" (R. 39).

That "the proposed rate of 30 cents from the New Orleans district to Chicago represents a 26-cent reduction in the present rate of 56 cents" (R. 39).

That "from the New Orleans district to St. Louis the proposed rate is 28 cents, 2 cents below that proposed to Chicago. It represents a reduction of 24 cents, the present rate being 52 cents. The standard barge line rate from the New Orleans district to St. Louis was 42 cents, except that the Mississippi Valley Barge Line Company maintained a rate of 37 cents. This rate was established in anticipation of an announced contemplated reduction of 4.5 cents in the all-rail rate from Louisiana points to St. Louis * * *" (R. 39).

That "the traffic manager of one of the principal refineries suggested 6 cents as a proper differential for the standard barge lines under the all-rail rate" (R. 40, 41).

That "the proposed rate from the New Orleans district to Cincinnati and Louisville is 30 cents, the same as to Chicago, and that proposed to Evansville and Cairo 28 cents, the same as to St. Louis. As was stated in connection with the previously considered case, the standard barge rates, in 1932, inclusive of loading, unloading, and marine insurance, were 44 cents to Cincinnati and Louisville, 42 cents to Evansville, and 39 cents to Cairo" (R. 41).

That "the proposed rates to the water competitive points, as applied also to the interior points in the intermediate territory, are generally lower than the water-truck combinations" (R. 42).

That "the usual water-truck rates to interior points north and south of the Ohio River are probably from 5 to 15 cents higher than the proposed all-rail rates of 28 and 30 cents" (R. 42).

That "the proposed rates as applied to the interior points alone would probably bring respondents [rail lines] a heavy traffic, would stop a large part of the distribution of water-borne sugar, and dry up much of the water movement" (R. 42, 43).

That "one of the main questions in this connection is whether respondents [rail lines] should be allowed to establish a rate to a water competitive point, Chicago, for instance, made solely with regard to water competition at that point, and then blanket it to the interior" (R. 43).

That "in 1932 the standard barge lines, generally with the 42-cent rate to St. Louis, took about nine-tenths of the sugar that moved northbound from Louisiana, notwithstanding the much lower rates of the contract barge operators. They handled about as much in 1932 as in 1931.

The slow, sporadic and uncertain service of the contract barges is unsatisfactory to some shippers. It is used only to supplement other transportation. Instances are cited in which contract-barge tows took six to seven weeks to reach St. Louis. At times the Mississippi River north of Cairo is difficult to navigate with low-powered towboats used in connection with the contract barges, because of swift current. The standard barge lines generally make the trip in two weeks” (R. 44).

That “the Federal barge line is even more of a sugar carrier, sugar constituting about 50 per cent of its northbound traffic * * * if the differential is substantially reduced the standard barge line will get less sugar and lower rates on such of it as they do handle. * * * Barge rates, made on the 80 per cent basis, if applied to the tonnage moved by the Federal barge line in 1931 would have cost that carrier about $350,000 and wiped out its showing of net revenue. If applied to the reduced volume that it would probably have received under a differential of about 5 cents they would have cost it much more” (R. 46).

That “if respondents succeed the barge lines will be dealt a staggering blow” (R. 46).

That “although sugar traffic in its present volume is almost vital to the existence of the barge lines, it would constitute but a small part of the traffic of the respondents. For the four-year period from 1928 to 1931, inclusive, the ratio of sugar tonnage to total tonnage averaged 1.4 per cent for the Illinois Central, 0.2 per cent for the Louisville and Nashville Railroad Company, and 0.5 per cent for the Southern Railway Company'' (R. 46).

That "if the schedules were approved, the rate from New Orleans to Terre Haute, Indiana, for instance, would be reduced from 56 cents to 30 cents, while to Paris, Illinois, a nearby point on Eastern lines, a rate of 56 cents would remain. Protestant urges that such disparities would be unduly prejudicial. The contention is not supported by any evidence of injury. No one who might be adversely affected appeared'' (R. 47).

That "rates to Western points beyond the destinations considered have not yet been specifically considered by respondents. Certain disparities would therefore result from the establishment of the proposed rates. The rate from New Orleans to Davenport, Iowa, for instance, would be reduced from 62 cents to 30 cents, but that from New Orleans to Des Moines, Iowa, for a similar haul, would remain at 65 cents. The Mississippi Valley Barge Line Company makes a point of this fact, but no one who might be adversely affected is before us * * *. Respondents expect to deal with these situations on their merits after our decision herein'' (R. 48).

PLEADINGS.

Appellant's bill alleges in general the matters above specifically set forth as being the findings of the Interstate Commerce Commission relative to the matters here in issue (R. 1-19).

That said decision and orders of the Interstate Commerce Commission upon the face of same and by specific finding or exact inference sanction rates for all-rail application between the origins and destinations involved, which will dry up much of the water movement and deal barge lines a staggering blow. That, therefore, the report and orders of the Interstate Commerce Commission admittedly refuse to give effect to the mandate of Section 500 of the Transportation Act of 1920, wherein it is expressly declared that water transportation is to be promoted, encouraged and developed, and that both rail and water transportation shall be preserved in full vigor.

That the decision of the Interstate Commerce Commission admits in specific finding that the rates authorized for all-rail application were intended alone to enable the railroads to recapture "traffic," and that the necessary result of this concerted action on the part of rail lines will be to cripple or eliminate water competition.

That, as evidence of the intent and purpose of the rail carrier to eliminate or cripple water transportation, Southern carriers, parties to Emerson's Tariffs, have substantially reduced the rates on every commodity handled by this appellant in excess of 1,000 tons per year (R. 5).

Said Commission, in said decision, has refused and failed to give effect to Sections 1 and 2 of the Sherman Antitrust Act (Act of Cong., July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; U. S. Code, Title 15, Sec. 1).

That said report and orders of the Commission under exact finding and inference admit a violation of Section 1 of the Interstate Commerce Act, in that the rates authorized or designated were not found to be reasonable, and

A violation of section 2 of said act, in that said rates were admittedly discriminatory, and

Violate section 3, in that the rates approved or authorized will result in undue preference, and

Violate the long-and-short-haul clause, to wit, Section 4 of the Interstate Commerce Act.

The bill further alleged (R. 15) that in order to attract tonnage to the barge-line movement it is necessary that a lower rate than the all-rail rate be applied for the barge-line movement, and that the Commission in various proceedings has recognized this fact in establishment of rates for water-rail movement.

The bill further alleges that the Commission, in its order granting to appellant a certificate of public convenience and necessity, found that the operation of appellant is in public interest and of public convenience, and that the effect of the present decision and orders of the Commission in its Docket 3814 is to withdraw and annul said orders for all practical purposes without said orders being directly brought in issue (R. 11).

That, in so far as the Commission's decision permits and allows the Southern lines to blanket back their rates in order that the Fourth Section of the Interstate Commerce Act may not be violated, it results in violation of sections 2 and 3 of said act, and that the Commission in said decision recognized these violations and makes no defense for same (R. 12-13).

That the appellant presented to the Interstate Commerce Commission a motion for rehearing and/or reargument (R. 15) in connection with its Docket I. & S. 3814, and that this appellant in said motion set forth changed conditions which had resulted subsequent to the making of the record before the Commission, and requested the Commission, by reason thereof, to grant to appellant a rehearing in said cause (R. 15). That said motion was denied by the Commission under date of August 3, 1933 (R. 16), and that the denial of said motion was the denial of a right guaranteed by law.

That the refusal of the Commission to postpone the effective date of the rates designated or authorized in the Commission's order until a three-judge court could be convened and give its consideration to an interlocutory order was arbitrary (R. 17).

That the particular rates approved or authorized by the Commission would result in irreparable loss and damage to this appellant (R. 4).

In conclusion, appellant alleges that by reason of the foregoing, the report and orders of the Interstate Commerce Commission are erroneous, unlawful, invalid, inconsistent, legally arbitrary and violate the Interstate Commerce Act and other particular federal enactments above specifically referred to (R. 18).

Appellant's petition prays for an interlocutory order and upon final hearing that the Court shall order, adjudge and decree that the said orders of the Commission are, and at all times have been, unlawful and void, and that same be set aside, suspended and annulled (R. 18, 19).

Attached to the petition is Exhibit A, major Southern lines, parties to Emerson's Tariffs; Exhibit B (R. 19-66) is the report and orders of the Interstate Commerce Commission of July 3, 1933; and Substituted Exhibit C (R. 67, 68) is the order of the Commission under date of July 18, 1933.

Answer of the United States of America.

(R. 69-73.)

The United States of America in its answer alleges that appellant is without legal standing to maintain this suit for the reason that it has no legal interest in the subject matter.

That the petition is without equity on its face.

That the petition discloses upon its face that there is nothing in the orders of the Commission to which the injunctive process of the Court can attach, for the reason that the orders merely permit certain tariffs and schedules to become effective.

This defendant then specifically admits or denies various allegations in appellant's bill, to wit, paragraphs 1, to and including 20.

Answer of Interstate Commerce Commission.

(R. 73-80.)

The Commission also admits or denies the allegations in appellant's bill, paragraphs 1, to and including 20.

Alleges that the appellant was guilty of laches in filing a motion for rehearing in that appellant failed to file the same and to call the Commission's attention to said alleged changed conditions until after the report and orders of the Commission.

That prior to the receipt of said motion by the Commission this appellant had filed this suit in the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, and thereby elected to proceed in court to obtain such relief and was thereby estopped from now asserting that the Commission ought to have granted said motion, and

Alleges that the appellant is without interest or capacity to institute or maintain this suit for the reason that the orders authorized and justified all-rail rates and that said rates do not apply to traffic over appellant's line.

That appellant's allegation of impairment of its status as a competitor with rail lines, even if such impairment is established, does not and would not constitute a legal injury or one which would entitle appellant to bring and prosecute this action.

Answer of Rail Lines—Interveners.

(R. 81-92.)

In accordance with federal enactment, the rail lines designated in the caption presented to the three-judge court an intervening petition and thus entered their voluntary appearance in this cause and filed an answer in behalf of said rail lines.

Said answer admits and denies the various paragraphs of appellant's petition, paragraphs 1, to and including 20.

Denies that the orders of the Commission in its Docket I. & S. 3814 subject appellant to legal injury.

That appellant has no legal right or interest which will be injuriously affected by said order and therefore has no right to institute and maintain this action.

That because the rates approved or authorized by the Commission took effect prior to said hearing, that the matters presented by the amended petition are moot.

Appellant's Supplemental Petition.

(R. 92, 93.)

Upon intervention of the rail lines designated as interveners, the appellant, by leave of Court first had, filed a supplemental petition, and in said petition asked the Court to order and decree that said rail lines, and each of them, having entered their voluntary appearance, should be enjoined from assessing, collecting or charging rates on sugar in carloads from the origins and to the destinations specifically designated in Emerson's Tariffs.

OPINION AND FINAL DECREE OF THE THREE-JUDGE COURT.

(R. 93-100.)

The Court in its opinion held:

First. That the allegations and contentions of the appellant that the Commission's finding and orders violated the Anti-Trust Law were answered by the fact that under Federal enactment only the United States can sue to enjoin common carriers for an alleged violation of the Anti-Trust Law with respect to matters within the jurisdiction of the Interstate Commerce Commission (R. 97).

Second. That Section 500 of the Transportation Act of 1920 which provides that both rail and water transportation shall be preserved in full vigor, was not violated and that said section was nothing more than a general statement of policy (R. 99).

The Court entered its final decree wherein it was "ordered, adjudged and decreed that the prayer of the bill of complaint be, and the same is hereby denied, and the bill of complaint is dismissed at plaintiff's cost" (R. 107).

Appellant, prior to said decision, presented to the three-judge court its request for findings of fact and conclusions of law, which request in behalf of appellant was not acted upon by the Court (R. 127, 129).

Appellees, in accordance with suggestion of the Court in its decision, submitted findings of fact and conclusions of law which were given by the Court (R. 100-106).

APPEAL.

Whereupon, and within due time under federal statute, appeal was perfected to this, the Supreme Court of the United States of America (R. 118).

AGREEMENT OF PARTIES THAT TESTIMONY OFFERED SHOULD BE CONSIDERED AS COMPETENT ON FINAL HEARING.

As originally intended, the appellant contemplated an interlocutory order and at the hearing introduced affidavits of various parties to support the allegations contained in the bill. When said affidavits were offered the defendants and interveners objected on the sole and specific ground that said affidavits were inadmissible in so far as they stated or purported to state facts inconsistent with or in conflict with the statement and findings contained in the report of the Interstate Commerce Commission dated July 3, 1933, and said affidavits were received by the Court subject to such objection (R. 129, 130). At the conclusion of the hearing the Court suggested that it might be agreeable to waive the interlocutory writ and in response to said suggestion appellant stated that if all parties to the proceeding would agree that the statements contained in said affidavits should be considered by the Court as competent evidence upon final hearing, that the appellant was agreeable to waiving a preliminary writ, and the appellants and appellees agreed that the statements contained in said affidavits should be considered as competent evidence upon final hearing, subject to the specific objection above referred to, and thereupon, the cause was submitted to the Court for final hearing and final decree (R. 130).

ABSTRACT OF TESTIMONY IN BEHALF OF APPELLANT.

(R. 130-135) **M. W. Howe**, general freight agent, Mississippi Valley Barge Line Company, with 12 years' experience in various forms of transportation service, refers to Emerson's Tariffs specifically designated in the bill and submits said tariffs to the Court as a part of his evidence, and states that said supplements were issued on account of the designated participating carriers and set forth the rates on sugar in carload involved in the decision of the Commission in its Docket I. & S. 3814. That sugar tonnage is an important movement over appellant's line. That traffic will not move by barge if rates are the same as rail rates and that this situation is recognized by shippers, traffic officials, and has been recognized by the Interstate Commerce Commission. That the rates designated on the 80,000-pound minimum by the

Commission in its decision and order I. & S. 3814 will carry the great preponderance of sugar tonnage, that he is familiar with the decision and orders of the Commission in its Docket I. & S. 3814, and that the findings in said report admit that the rail rates designated for all rail application—80,000-pound minimum refined sugar carload, will be from 5 to 15 cents less than the competitive rate of the barge-truck movement. That said proposed rates on said 80,000-pound minimum were increased by the Commission 4 cents per 100 pounds and that the said rates so designated and authorized by the Commission result in rates to interior points north and south of the Ohio River from 1 to 11 cents, less than the competitive rate for barge-truck movement from the same origins and to the same destinations; that the particular rates so authorized by the Commission will result in the entire loss of sugar tonnage to barge line unless the barge line rates are reduced to a figure below the rail rate and that giving consideration to the movement of sugar over the appellant's lines during the past years that said reductions will result in the depletion of appellant's revenue and to such an extent that it will make the continued operation of the Mississippi Valley Barge Line Company an unprofitable venture.

That since a hearing of the instant docket before the Commission the major portion of sugar moved between ports by water carriers has moved on rates and via the service of certificated barge line and at rates substantially higher than 25 cents, and that said rates so designated for all rail application in order for the barge line to secure any sugar tonnage will require a lowering of their port to port rate and that a reduction to a differential under the all-rail rate approved and authorized by the Commission would result in a substantial depletion of appellant's revenue and, in the opinion of the witness, will render the continued operation of the Mississippi Valley Barge Line Company an unprofitable undertaking.

That the rail carriers concurring in the particular tariffs in issue since the presentation of the sugar rates to the Commission, have reduced their all-rail rates in substantial amounts on a large majority of the commodities which have moved by barge lines and that said reductions were general in their application, and that the reductions in the rates on said commodities have resulted in substantial reduction of the revenues of the appellant.

That the Commission in its decision justifies rates from New Orleans and other gulf ports to points in Arkansas and adjacent territory which are higher than rates for points beyond and as a specific example cites the rates fixed by the Commission from New Orleans to Jonesboro, Arkansas, at 34 cents for 486 miles, that Jonesboro, Arkansas, is intermediate between New Orleans and St. Louis by direct routes, and that the rate fixed by the Commission from New Orleans to St. Louis is 32 cents for a distance 698 miles, that no Fourth Section relief is asked or granted to the Southern lines, and that said situation results in a violation of the Fourth Section of Interstate Commerce Act in that it permits and justifies a higher rate for a shorter distance than for a longer distance over the same route.

That the short-line rail distance from New Orleans to Des Moines, Iowa, is 1,016 miles; that the short-line rail distance from New Orleans to Davenport is 919 miles; that, according to the decision of the Commission, the rate from New Orleans to Davenport, 80,000-pound minimum, becomes 34 cents, while the going rate from New Orleans to Des Moines, Iowa, will remain at 67 cents. That the Commission justifies this situation by the statement that the rail lines intend to cure this violation. That, in the witness' opinion, the only way in which this violation can be cured is by the adjustment of rate to Des Moines to the reduced rate of 34 cents, but this will in turn create the same relative maladjustment to points beyond Des Moines.

(R. 135, 136) **Phil G. Safford,** assistant to the president of the Mississippi Valley Barge Line Company, 20 years' experience in connection with railroads and other transportation agencies: This witness is charged with the responsibility of matters pertaining to appellant's traffic and the rates to be charged upon same; that he is in constant contact with shippers and executives of rail lines with reference to transportation by rail and water; that he is familiar with the various tariffs which have been published and presented to the Commission in connection with various rates and upon the particular commodities which have been published for the alleged purpose of meeting water transportation. That the Southern lines, who concur in Agent Emerson's Tariffs referred to in the petition have, since June, 1932, and from time to time, proposed certain tariffs which have carried substantial reductions in rates on the following commodities: Bagging, canned goods, coffee, corn, cotton, glassware, paper and paper products, pulp (paper), rice, soap, sugar, sulphur and tobacco. The rates on canned goods, cotton, rice, soap, tobacco, sulphur, corn, glassware, paper and sugar published by the rail carriers since June, 1932, represent reduction in prior rates of from 15 to 45 per cent below rates theretofore fixed by the Interstate Commerce Commission in various proceedings as reasonable rates. That the rates so reduced by Southern carriers are made solely upon commodities which move by barge line to and via ports on the Mississippi and Ohio Rivers. That the Southern carriers concurring in Emerson's Tariffs have not made corresponding reductions in rates on other commodities which do not move in connection with the barge line. That said reductions have substantially affected the revenue of this appellant and that the commodities upon which the reductions have been made by rail lines constitute 60 per cent of the volume of the business which the barge line has been able to move, and that witness is not aware of any movement that can compensate for the loss of revenues occasions by said reduction. That these losses of appellant's revenue and tonnage will prevent the continuation of the operation of this appellant as a profitable venture.

(R. 136-141) **L. W. Childress,** president Mississippi Valley Barge Line Company, a corporation organized under the laws of the State of Delaware. Said company is authorized to engage in and carry on general transportation business in any and all of its branches, both freight and passenger, and to build, construct and own various equipments necessary to such operation.

This witness states that he promoted and organized said appellant corporation and that in said undertaking he was familiar with and advised of the provisions of Section 500 of the Transportation Act of 1920, and relied upon the mandate of said Act that both water and rail transportation would be preserved in full vigor. That appellant corporation has a capital stock of $3,500,000.00, fully paid, and that in its organization no sums were paid for promotion or commission. That he also, as promoter and organizer of said corporation, was also influenced in promoting said venture by reason of the fact that the Federal Government had and was appropriating huge sums of money for making the Ohio, Mississippi and their tributaries navigable for water-borne tonnage, and had provided by enactment for a corporation to be operated by the Federal Government to demonstrate the feasibility and economy of water transportation, and specifically designated in said enactment that the demonstration was for the purpose of eventually attracting private capital to undertake and continue said operation.

That the appellant corporation, pursuant to its charter, purchased four towboats of 2,000-horsepower capacity, fifty (50) barges of 310-ton capacity, and erected or leased terminals at river ports upon and along the Mississippi and Ohio Rivers, and that the total investment of said corporation in terminals and equipment was in the sum of $3,498,693.11. That appellant's operations began in October, 1930, and since said date appellant has been continuing said operations upon regular schedule with dependable service.

That, in conformity with law, appellant applied to the Interstate Commerce Commission for a certificate of convenience and necessity in Ex Parte 99, 167 I. C. C. 41, and that after public hearing said Interstate Commerce Commission, on or about July 11, 1930, issued a certificate of convenience and necessity to the Mississippi Valley Barge Line Company, and said Commission by order issued specifically found and stated:

> "That the present and future public convenience and necessity require the operation of the Mississippi Valley Barge Line as a common carrier by water upon the Mississippi and Ohio Rivers between Cincinnati and New Orleans and intermediate points."

Thereafter, on the 11th day of March, 1932, by supplemental application, the Interstate Commerce Commission issued its certificate of convenience and necessity and found that the present and future public convenience and necessity require the operation of appellant as a common carrier between New Orleans and St. Louis and intermediate points.

Witness states that he is in immediate and direct contact with the management and operation of the Mississippi Valley Barge Line Company since its inception, is familiar with the character of tonnage that is moving and the particular origins and destinations of said tonnage and has kept exact records of the revenues obtained in the movement of said tonnage, and that the present operation of appellant corporation has now reached the point where the gross revenues slightly exceed the operating and overhead expenses.

That sugar tonnage of appellant company in years past has constituted 33⅓ per cent of its total tonnage moving over and along its line and approximately 40 per cent of its total revenue.

That the all-rail rate from New Orleans to St. Louis, as a typical example, on sugar carload since 1922 has been 50 cents per 100 pounds, which, in 1932, by Ex Parte 103, was increased by the Interstate Commerce Commission 2 cents per 100 pounds. That the Southern rail carriers, in connection with the tariffs specifically set forth proposed rates as typical from New Orleans to St. Louis of 28 cents on 80,000-pound minimum. The witness states that from his experience in transportation it is necessary, in order to attract tonnage, that the barge rate be made lower, to wit, differential under the all-rail rate from origins to destinations and that the Interstate Commerce Commission has recognized this principle in Ex Parte 96, 99 and 102, and has directed and prescribed differentials under the all-rail rate of amounts in cents per 100 pounds, to be determined by taking 20 per cent of the all-rail rate applicable between the two ports served by the barge line in a given movement and thus determined the differential relationship between the barge and the all-rail rates.

That the Commission, in its decision and orders, recognized that 80,000 pound minimum rates will carry the preponderance of sugar tonnage and that the rail rates proposed by the rail lines were from 5 to 15 cents lower than the cost of the barge-truck movement to interior points, and in authorizing rates 4 cents higher on this minimum than those proposed, has approved and authorized for application by rail routes rates from 1 to 11 cents lower than those applicable by competitive barge-truck service. That he, and representatives of appellant company, have interviewed shippers of sugar with respect to tonnage, and that these shippers definitely state that they will not continue to patronize barge service except at differentials under the all-rail rate. That he has had compiled figures from the books of appellant company and that said compilation indicates a loss in revenue which would have accrued on the sugar moved by appellant, from January 1, 1931, to July 31, 1932, if the barge-rail rates suggested by the Commission in their order had been in effect during that period, in the approximate sum of $112,000.00. That in its port-to-port movement during the same period the total net loss would have been in the approximate sum of $120,000.00.

That the alleged purpose of the proposed rail reductions was to meet the competition of contract operators on the river. That said contract operators have, with the exception of the American Barge Line, discontinued operation, and that the American Barge Line, whose service is infrequent, is now charging a rate of 25 cents from New Orleans to St. Louis on minimum lots of 450 tons and that this rate does not include the loading and unloading charge and other terminal service, which services are performed by certificated barge lines at an average cost of 9 cents per hundredweight. That thus the cost to the shipper of sugar from New Orleans to St. Louis via the American Barge Line would be approximately 34 cents, or 2 cents per 100 pounds higher than the rail rate authorized by the Interstate Commerce Commission. That on sugar moved to St. Louis via the American Barge Line and points beyond St. Louis, the rail rate in some cases would be as much as 20 cents per 100 pounds lower than the barge-truck rate, and the noncertificated barge lines have no rail-barge rates and consequently do not have the highly important advantage of transit privileges.

That the majority and major portion of the sugar moving by barge line over and along the Ohio and Mississippi

Rivers has moved on rates of 37 cents or 42 cents per 100 pounds; that these particular rates are charged by certificated barge lines having received certificates of convenience and necessity from the Interstate Commerce Commission, and that these particular rates are typical of the character of the competitive rates, and that the proposed rail rates are substantially lower than the rates charged by the certificated barge lines giving regular and dependable service.

Witness reiterates the statement with reference to the reduction in rail rates on the particular commodities mentioned by the preceding witness, and states that they constitute substantially every commodity handled by appellant in excess of 1,000 tons per year, and adds that the rail rate reductions on the same commodities have not been made general by the rail carriers and made applicable to all territory served by rail lines.

That it is within the witness' knowledge and a matter of record that when water transportation has been eliminated or crippled upon the inland waterways that the rail rates immediately thereafter have been substantially increased.

That in the opinion of the witness and from his experience in connection with transportation and traffic matters, if the orders of the Commission are allowed to stand they will eliminate river transportation upon the Ohio and Mississippi Rivers.

That Congress in response to public demand has appropriated within the Mississippi Valley and spent within the past, and has appropriated for future expenditures, the total approximate sum of $475,000,000.00 for the purpose of building navigable channels adequate for reasonable, dependable and regular transportation service and terminal facility upon and along the rivers of the Ohio. That the State of Illinois has expended $35,000,000.00 for improvement of the Illinois River. That municipalities and private capital have made huge expenditures for terminals and dock facilities for the accommodation of riverborne traffic and that all of these expenditures will be rendered valueless if water transportation is eliminated.

(R. 142-153) **J. R. Van Slyke** testifies to the request addressed to the Interstate Commerce Commission, Honorable P. J. Farrell, chairman, on July 26, 1933, wherein the Commission was advised that this appellant would file a suit to enjoin the order of the Commission in sugar cases I. & S. 3814. That district judges were away from St. Louis and it was therefore impossible to secure interlocutory stay or order before effective dates of rates, to wit, July 29 and July 31, and "Will the Commission therefore kindly change the effective date of said rate so we can secure service and arrange for expedited hearing by three-judge court (stop) Our representative leaves tomorrow to interview District Court Judge and hasten ~~this~~ hearing with all possible speed (stop) Advise by wire collect." An answer to same was received on July 26, 1933, "Your wire twenty-sixth Commission concludes it cannot consistently comply with your request."

That he had prepared and on July 25, 1933, forwarded to the Interstate Commerce Commission a motion for rehearing and/or reargument and/or modification on behalf of the Mississippi Valley Barge Line Company, Protestant in Docket I. & S. 3814, that said motion was forwarded to the Commission in accordance with its rules of practice and within due time. That said motion presented changed conditions which had resulted and obtained since the making of the record in this proceeding (I. & S. 3814) and on account of said changed conditions asked the Commission to rehear said cause. That thereafter, on, to wit, August 3, 1933, said motion for rehearing was by the Interstate Commerce Commission overruled. Witness attaches a copy of said motion and specifically directs the Court's attention to page 2, and including 18, where specific statement of alleged changed condition is contained (R. 143, 153).

(R. 152-156) **J. D. Beeler,** vice-president, Mead Johnson Terminal Corporation, owning and operating river-rail terminal and warehouse at Evansville, Indiana, total investment in excess of $500,000.00. Said investment made upon assumption of continued operation of water transportation by barge between the City of Evansville and points on the Mississippi and Ohio Rivers. The principal value of said facility is in connection with traffic which has been water-borne and any curtailment of water transportation will result in decreasing the value and utility of sai facility; 66 per cent of its revenue is derived from freigh traffic which has been water-borne to, from and via it terminals; has handled approximately 60,000 tons of sugar one-third was stored in transit for varying periods in warehouse facilities, and this traffic was subsequently moved t points beyond Evansville at through rail-barge rates. The present barge-rail rates applicable on sugar via Mississipp Valley Barge Line in connection with rail lines via Evansville, Indiana, over witness' terminal, thence rail lines t points beyond, are on a materially higher basis than the rates which the Interstate Commerce Commission has authorized for all-rail application from New Orleans to sai destinations, principally in the States of Illinois, Indian and Wisconsin. Witness is in contact with shippers, has been uniformly advised that unless the barge-rail rate are reduced to a differential under the all-rail rate, that no movements by barge route will be made. That since the commencement of operation of witness' company, said company has lost a considerable volume of tonnage and revenue by reason of the reductions in all-rail rates on through traffic which have been put into effect by rail lines for the purpose of eliminating water transportation. Witness cites as an example the item of coffee imported via New Orleans. On September 18, 1932, the rail lines reduced the rates on this traffic 17 cents, New Orleans to Chicago. Thereafter, Mississippi Valley Barge Line Company was unable to maintain barge-rail rates differentially under the rail rate, and that as a consequence the movement of this traffic was lost to the route via his company's facilities. Prior to this time Mead Johnson Terminal Corporation had handled approximately 6,712 tons of this traffic. The loss in water-borne tonnage will render the Mead Johnson Terminal Corporation an unprofitable venture and render the value of said facilities of questionable future worth.

The United States of America and the Interstate Commerce Commission, defendants therein, presented no testimony.

ABSTRACT OF TESTIMONY OFFERED BY INTERVENING RAIL LINES.

(R. 156-160) **M. L. Costley**, assistant traffic manager, Illinois Central Railway Company, at New Orleans, Louisiana, engaged in rate and traffic work for said railroad at New Orleans for 30 years. As a part of his duty he was to keep himself informed and to know the various tonnage available for shipment from New Orleans to points in the North, including sugar; that there is exceedingly keen competition between carriers reaching New Orleans, including not only rail carriers, but carriers operating barges on the Mississippi River from New Orleans to points in the North, for the transportation of sugar from refineries located in the New Orleans district.

Witness states that since the date of the hearing before the Commission in I. & S. Docket 3814, sugar from the Gulf and South Atlantic ports has been keenly competitive and with respect to the competition of the rail carriers and the barge lines, it is the same as at the time Docket I. & S. 3814 was heard by the Interstate Commerce Commission. The witness then sets forth contract-barge shipments and shipments of the American Barge Line from New Orleans to ports on the Ohio and Mississippi Rivers and the particular charges which the witness believes were assessed for the tow service from New Orleans to various Ohio and Mississippi River ports, giving some dates of shipments, the boat, and pounds or tons.

(R. 160, 161) **J. L. Sheppard,** general freight agent of the Illinois Central Railroad at Chicago, Illinois, 37 years experience in rate and traffic work for said railroad. That the rates applying on sugar shipped from New Orleans to various points in the Southwest and the North which took effect July 29, 1933, and July 31, 1933, published by rail lines after decision of the Interstate Commerce Commission in its Docket I. & S. 3814, are not in violation of Fourth Section of the Interstate Commerce Act for the reason that said rates, higher to an intermediate point than to points beyond, are protected by Fourth Section Order No. 7542 issued by the Interstate Commerce Commission, and that therefore said rates from New Orleans are not unlawful and void.

SPECIFICATION OF ASSIGNED ERRORS WHICH WILL BE URGED BY APPELLANT IN THIS APPEAL.

(R. 163, 164.)

1. That the three-judge court erred in entering its final decree ordering, adjudging and decreeing that the prayer of the bill be denied and the bill of complaint be dismissed. Assignment of Error No. 1 (R. 108).

2. That the three-judge court erred in giving finding of fact No. IV, requested by the appellees, to the effect that the Interstate Commerce Commission found that the rates which it approved would be compensatory. Assignment of Error No. II (R. 108).

3. That the three-judge court erred in giving conclusion of law No. III, requested by appellees, to the effect that the findings and orders of the Commission were not arbitrary or discriminatory or void or in violation of or contrary to any provision of law or any mandate of Congress, and particularly are not contrary to the mandate of Section 500 of the Transportation Act of 1920. Assignment of Error No. IV (R. 109, 110).

4. That the three-judge court erred in giving conclusion of law No. IV, requested by appellees, to the effect that the Interstate Commerce Commission, in entering the orders complained of did not exceed the powers conferred

upon it by Congress and did not fail to observe or comply with all the requirements of the applicable law in the proceeding before it, but gave heed to all such law and proceeded in full conformity to same. Assignment of Error No. V (R. 110).

5. That the three-judge court erred in giving conclusion of law No. VI, requested by appellees, to the effect that there was no abuse of discretion on the part of the Interstate Commerce Commission in denying appellant's motion for rehearing timely filed with the Interstate Commerce Commission. Assignment of Error No. VII (R. 110).

6. That the three-judge court erred in giving conclusion of law No. VII, requested by appellees, to the effect that the orders of the Interstate Commerce Commission sought to be enjoined and set aside in this suit are valid exercise of authority vested in the Commission and no error was committed in the proceedings and the bill of complaint must therefore be dismissed. Assignment of Error No. VIII (R. 111).

7. That the three-judge court erred in failing to consider, give or reject any and all of the conclusions of law and findings of fact presented by the appellant to the court in accordance with the suggestion of the three-judge court. Assignment of Error No. XVIII, and specific Assignments of Error IX to and including XXVII (R. 111-118).

Statement.

The Interstate Commerce Commission combined for hearing and argument certain other proceedings then pending before the Commission having to do with sugar rates from Atlantic and Pacific Seaboard to this and other destinations. This appellant is attacking alone the report and orders of the Commission in its Docket I. & S. 3814 designated "Sugar rates from Gulf and South Atlantic Ports."

ARGUMENT.

THE RATES AUTHORIZED BY THE COMMISSION'S ORDERS ARE NEITHER JUST, REASONABLE NOR COMPENSATORY.

The Court below at appellee's request gave the following finding of fact (R. 102, 103):

> "The Interstate Commerce Commission found that the rates which it approved would be compensatory."

The Court to support this finding refers to sheet 21 of the Commission's decision which we summarize as follows (R. 102, 103):

1. That the proposed rates are high enough to pay more than the cost of the service.

2. The earnings would compare favorably with those of Eastern lines just considered.

3. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240.00 per minimum carload, for the short-line distance of 912 miles.

4. The ton-mile earnings would be about 6.5 mills.

5. System costs for all traffic on the Illinois Central are about 6 mills per ton mile.

6. The traffic considered would be principally added tonnage that could probably be carried at far lower costs.

7. Many commodities are handled by respondent at much lower rate.

We earnestly and sincerely suggest to the Court that there is nothing in these particular findings by the Commission which contain a definite and positive statement that the rates which it approved would be reasonable or compensatory.

The Commission's reference to the term "ton-mile earnings" of the Illinois Central on the movement of sugar under the rates proposed or authorized does not portray the situation, for the reason that any refinery location which is not on the rails of the rail carrier performing the line haul out of the rates now in effect will have to absorb at origin point the particular charges which will be made by the carrier which receives the carload of refined sugar from the refinery and makes delivery at New Orleans to the line-haul carrier which will carry the car to Chicago, Illinois, as an example. Then at Chicago, Illinois, if the consignee is not located on the tracks of the line-haul carrier a charge will be made to said carrier by either the switching line or a rail line which effects delivery of the car at the unloading track. The same character of expense will be chargeable against a line-haul carrier, such as the Illinois Central, in the event said car is destined to a point which takes the same rate as the Chicago rate, in which event the Illinois Central will have to deliver said car at Chicago to the switching line to effect delivery to the last carrier and pay for said service. The same situation applies when the rail lines grant transit privilege at Chicago and the delivery is effected under this arrangement. These particular charges are substantial in amount and will have to be absorbed out of the through rate, and will materially reduce the ton-mile earnings of 6.5 mills per ton mile indicated in the Commission's report as applicable to the Illinois Central under the rates here involved.

In connection with the statement of the Commission which the three-judge court used to make a finding that the rates authorized were compensatory, we desire to direct the Court's attention to the following:

The Commission and the Court refer to the system cost of the Illinois Central as being 6.5 mills per ton per mile. The Interstate Commerce Commission in its decision, Fourth Section Order No. 15,156, decided November 17, 1933, designated "Grain and Grain Products to Florida," states:

> "From a statement of operating statistics for all Class 1 carriers in the Southern region for the year 1931 it appears that the average freight expense for an average haul of 191.8 miles per revenue ton was 8.2 mills per ton mile."

Since the hearing in I. & S. 3814 was held during the year 1932, the figures referred to in the Commission's report for the Illinois Central are for the year 1931. We here have a definite contrast as between the earnings referred to of the Illinois Central of 6.5 mills and for all Southern lines of 8.2 mills, who are parties to the tariff in question and who would participate in the movement of sugar under the rates here involved.

In "**Interstate Commerce Commission, Forty-fifth Annual Report on the Statistics of Railways of the United States, for the Year Ended December 31, 1931,**" prepared by the Interstate Commerce Commission and published by the Bureau of Statistics, there appear the annual statements of Class 1 carriers for Southern region. On page 78 there appears the income account of the Illinois Central, and statistics show the Illinois Central operating revenue to be $99,095,977.00, and show the railway operating expense as $80,579,955.00. These figures cover the total for both freight and passenger business. Of the latter figure that portion which was assigned to freight is the figure which produces the system cost of the Illinois Central, cited by the Commission as being 6.5 mills per ton mile. That the $80,579,955.00 shown as "Railway Operating Expenses" does not cover all of the expenses which must be met out of operating revenues is apparent upon an examination of the above referred to income account of the Illinois Central. The net revenue from railway operations is stated as $18,516,022.00, but after a series of additions and deductions of other income and expenses, such as Railway Tax Accruals, rental of equipment, interest on loans, etc., the net income has been completely wiped out and in addition an amount of $1,478,568.00 is shown as being a net loss. Merely taking the gross revenue on freight shown on page 80 of the above referred to document of $78,264,606.00 and dividing it by the 9,752,000,000 ton miles of revenue traffic handled in 1931 by the Illinois Central as reported in "**Interstate Commerce Bureau of Statistics Comparative Statement of Operating Averages for Class 1 Steam Railways in the United States, Years 1931 and 1932,**" produces a ton-mile earning of 8 mills, which failed to pay all expenses, let alone any return on $154,445,192.00 of capital stock of the Illinois Central, shown on page 76 of the first above-cited statistics as outstanding.

Another comparison which we deem significant taken from these same two **Interstate Commerce Commission Statistics** indicates that while the railway operating revenues for Class 1 carriers in the Southern region was $515,584,069.00, with railway operating expenses of $424,823,685.00, the final net after deducting other expenses is a net loss of $23,494,789.00 (pages S-106, 107 of the first above-cited document). Freight revenue is shown on pages S-108, 109 as being $416,023,095.00. From the second cited document it appears that these carriers handled a total of 37,677,000,000 ton miles of revenue traffic, which figure applied against the gross freight revenue of $416,023,095.00 indicates that a ton-mile revenue of 11 mills per ton per mile failed to pay expenses by over $23,000,000.00, to say nothing of a return on the outstanding capital stock of $886,814,457.00 shown on pages S-104, 105 of the first above-cited document. This indicates the character of earnings that the rail lines have to obtain before they can earn $1.00 over and above the necessary expense incident to operation, and contrasted with the statement of 6.5 mills as used in the Commission's report, indicates the character of the rates proposed by the Southern lines and the character of the rates authorized by the Interstate Commerce Commission.

The Interstate Commerce Commission in its finding and decision recognized that the rates sought to be reduced by the proposed schedule have been in existence as the going rates for rail application since 1922.

In 1922 the Interstate Commerce Commission gave consideration to the sugar rates from various origins and to various destinations, including rates from New Orleans to Chicago, and in its decision, 81 I. C. C. 448, 472, the Commission found that the then going rate from New Orleans to Chicago of 60 cents per 100 pounds was not unreasonable. Commissioner Campbell, in connection with this decision, held that the rates from New Orleans to destinations north of the Ohio River and east of the Mississippi River, including the 60-cent rate to Chicago, were unreasonable minimum (81 I. C. C. 448, 480). The Interstate Commerce Commission, subsequent to this decision, indicated to the carriers and shippers that they should "compose their differences." As a result of this suggestion, carriers and shippers agreed on a rate from New Orleans to Chicago of 54 cents per 100 pounds, and related rates were published to other destinations. This rate then bore the badge, according to the Commission's decision, of being less than a reasonable or compensatory rate.

The Commission thereafter, in Burlington Shippers Association v. A. T. & S. F. R. R. Co., 88 I. C. C. 46, 48, said:

> "In Sugar Cases of 1922, 81 I. C. C. 448, we indicated that the rate of 54 cents from New Orleans to Chicago is less than a reasonable maximum rate."

By direct inference the Commission states that the 54-cent rate from New Orleans to Chicago was in the realm of a noncompensatory rate.

This rate of 54 cents and rates to other destinations related to the Chicago rate were approved by the Commission at a time when a rate war was imminent between various rail carriers, and in said cause the rail carriers seriously urged the Commission to invoke its minimum rate power in order to approve of said rate.

Sugar is classified by all-rail lines, including the rail carriers involved in I. & S. 3814 as fifth class, and in the various territories this is from 35 per cent to 45 per cent of the first-class rate. Sugar now and in the past has moved on this basis in Official Classification territory. This statement indicates what rail lines consider a reasonable rate upon sugar. The Commission in Southeastern Sugar Investigation, 132 I. C. C. 447, prescribed as a reasonable rate on refined sugar, carload, 27½ per cent of the first-class rate. The rate proposed by same rail lines involved in the previous case from New Orleans to Chicago on 80,000-pound minimum is a little less than 13 per cent of the applicable first-class rate. The rate authorized by the Commission is 16 per cent. This statement answers the question of whether or not the rates proposed by the rail lines for application were reasonable or compensatory rates for the movement of sugar.

The rates put into effect by virtue of the decision and direction of the Interstate Commerce Commission in 1922 continued in effect for over eleven years without complaint filed by any shipper, and there was no contention made that the level of those rates was beyond reasonable rates. The Commission thereafter, in Ex Parte 103, 178 I. C. C. 539, specifically found that the going rates on sugar were one of the low spots in the rate structure and increased the rates on sugar 2 cents per 100 pounds, which produced a rate of 56 cents from New Orleans to Chicago and 52 cents from New Orleans to St. Louis, and the rates to other destinations were related thereto. These are the particular rates which were in effect at the time of the hearing of the Commission's Docket I. & S. 3814. The rate proposed by the tariffs involved in the Commission's decision upon the 80,000-pound minimum from New Orleans to Chicago is 30 cents, a reduction of 26 cents in amount, and a reduction in per cent of 46 per cent. The Commission on this minimum approved a rate of 34 cents, which results in a reduction of 22 cents in the rate which had been in existence and satisfactory to carriers and shippers for a period of eleven years.

The rates proposed by the rail line from New Orleans to St. Louis on the same minimum was 28 cents. The Commission approved a rate of 32 cents. This is a reduction of 20 cents per 100 pounds. Under the evidence and in accordance with the Commission's exact statement, these are the particular rates which will carry practically all of the sugar tonnage.

As further evidence of the character of the rates which the Commission approved or designated, and taking the exact finding of the Commission as a basis of our statement, we find that the rates from New Orleans to Terre Haute, Indiana, will become 34 cents under the authority of the Interstate Commerce Commission, while the going rate from New Orleans to Paris, Illinois, 19.1 miles from Terre Haute, continues at 56 cents per 100 pounds.

Another situation exactly found to result from the Commission's orders and specifically referred to in their finding is the rate from New Orleans to Davenport, Iowa, which rate becomes 34 cents, while the rate from New Orleans to Des Moines, Iowa, for practically the identical haul, remains 65 cents. These particular illustrations are typical of the entire situation which is produced under the authority of the Interstate Commerce Commission and in connection with the movement of sugar, carload, by rail line. These illustrations indicate in no uncertain terms the character of the rates which the Commission authorized for all-rail application.

In connection with the above illustration, it should be noted that Southern carriers would participate in the movement of sugar, carload, from New Orleans, to both Paris, Illinois, and Des Moines, Iowa, as typical. They would take a division of the through rate for their services in effecting said movement. According to any known method of arriving at a division among rail lines they would receive upon a division of the rate to either Paris, Illinois, or Des Moines, Iowa, an amount in excess of the going rate to Terre Haute or Davenport. To illustrate, if it is on a mileage prorate the carrier moving the sugar from New Orleans through Davenport to Des Moines would take approximately nine-tenths of the 67-cent rate, approximately 60 cents. The Southern rail lines cannot and do not contend that the going rates to Paris, Illinois, and Des Moines, Iowa, are excessive or unreasonable rates. It therefore follows that the rates to Terre Haute and Davenport, as approved and authorized by the Commission in its orders and in its Docket I. & S. 3814, of necessity are neither reasonable nor compensatory rates. We therefore suggest that the Commission, having in its prior decisions determined reasonable rates for refined sugar, could not consistently find these rates reasonable or compensatory, but simply found that the rates proposed "are high enough to pay more than the cost of service." This is not a finding by the Commission that the rates are either reasonable or compensatory; it is a finding alone that the rates charged pay alone the out-of-pocket costs for the specific transportation service performed and falls far short of a finding that the rates are of such a character as will enable the rail lines to continue as efficient and effective transportation agencies. Such a finding does not give consideration to the necessary cost and expense which rail lines must pay in order to cover overhead, necessary and reasonable maintenance, repairs, improvements and betterments, as well as pay interest on invested capital, which are essential and necessary to the continuation of rail transportation service.

That the rates proposed cannot be considered as reasonable or compensatory is further patently demonstrated by the finding of the Commission that the rates proposed from the origins here involved to destinations such as St. Louis will blanket back as far south as Northern Alabama, Northern Mississippi and Northern Georgia points. The Commission, in Southeastern Sugar Investigation, 132 I. C. C. 477, prescribed as reasonable rates on refined sugar, carload, for application within the Southern territory, the same origin territory as involved in the Commission's Docket I. & S. 3814, 27½ per cent of first class. This basis would carry sugar from New Orleans or Mobile on the proposed rate of 28 cents a distance of from 180 to 200 miles from such origins. On the basis of the 32-cent rate found justified this basis would carry the sugar a distance of 261 to 280 miles from such origins, and on the basis of

34 cents would carry the sugar from 281 to 300 miles. Here we have a definite and positive comparison of what the Commission considers the volume of reasonable rates on refined sugar carload for application within Southern territory and the rates which they justified for the same commodity moving from Southern destinations to destinations in Southern territory and points beyond. The Commission in this decision has justified a rate of 34 cents from New Orleans to Chicago, a distance of 912 miles, and has justified a rate of 32 cents from New Orleans to St. Louis, a distance of 698 miles, or to consider points alone within Southern territory the rate authorized by the Commission from New Orleans to Cincinnati, a distance of 836 miles, is 34 cents.

The motivating force that occasioned the rail lines to make the drastic reduction in the sugar rate was alone to recapture sugar traffic. This is borne out by the Commission's finding. "These cases represent a contest among railroads, water and motor truck for that great volume of sugar traffic," and "carriers are seeking * * * drastic and sweeping * * * reduction in rates, with the hope of recapturing their losses of traffic—they may consider even lower rates if those proposed * * * do not prove sufficiently effective." Also, "One of the main questions in this connection is whether respondents should be allowed to establish a rate to a water-competitive point, Chicago for instance, made solely with regard to water competition at that point."

We urge upon these findings that the Commission excludes the idea that the rail carriers, in proposing the rates in question, were giving consideration to anything other than their purpose to recapture sugar tonnage.

Under the evidence in this case and giving effect to the exact findings of the Commission in its decision, the conclusion seems justified, if not inevitable, that the rail lines, in the rates they proposed, were not intending and did not have in mind the meeting of the competitive rate of the barge operators who carry by far the major portion of the sugar tonnage. Their evident intent and purpose is to eliminate, rather than to meet, water competition. This is disclosed by the level of the rates which the rail lines propose. The rates proposed are not in any way related to the going rates charged by responsible and reliable barge lines as distinguished from the tramp operator. The proposal of a 28-cent rate from New Orleans to St. Louis to meet a barge rate of 42 cents cannot be reconciled with the alleged intent of rail lines to meet a competitive situation. The proposal of a 30-cent rate from New Orleans to Cincinnati and Louisville to meet a competitive barge rate of 44 cents, and the proposal of a 28-cent rate to Evansville and Cairo to meet a competitive barge rate of 39 cents, cannot be reconciled with the alleged purpose of prescribing rates which are to meet the rate of a competitor (R. 39-41).

The Commission indicates that the carriers' intention in proposing the rates in controversy was to meet alleged competitive rates of contract barge operators, but the Commission expressly denies this inference when it specifically finds that nine-tenths of the water-borne sugar tonnage moves by the standard and responsible barge lines on rates of 37 cents and 42 cents from New Orleans to St. Louis (R. 44).

The Commission further finds that the low rates of contract-barge operators have not had an adverse effect upon the traffic of the standard or certificated barge lines and that the slow, sporadic and uncertain service of the so-called contract-barge operators is unsatisfactory to some shippers and is used only to supplement other transportation (R. 44). The Commission specifically calls attention to certain quoted contract-barge rates but finds that "so far as appears such rates have not been used" (R. 40).

The conclusion from this finding by the Commission is that the rail lines intended, and the Commission has approved of a volume of rates which were intended, not to meet the competitive rate of the barge line that carried 90 per cent of the sugar tonnage, but to eliminate water transportation.

The decision of railway executives to base their rates upon rates which, if used at all, were used to move not more than one-tenth of the water-borne sugar, would certainly be open to just criticism. If the rail lines did not have the intent and purpose that we suggest, then they would have proposed rates with some reasonable relationship to the going rates of the standard barge lines.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION HERE COMPLAINED OF ADMITTEDLY SANCTION A VIOLATION OF THE TRANSPORTATION ACT OF 1920.

Appellant urges that the express finding of the Commission as contained in this report, and the exact and definite inferences therefrom, establish the fact that the Interstate Commerce Commission refused and failed to give effect to Section 500 of the Transportation Act of 1920 (41 Stat. L. 499, Act of Cong. Feb. 28, 1920, c. 91, Sec. 500, 41 Stat. 499; 49 U. S. Code, Sec. 142), and that said orders are therefore unlawful and void.

This enactment reads as follows:

> "It is declared to be the policy of Congress to promote, encourage and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

Appellant suggests that Congress, by this enactment, voiced its mandate to federal agencies, specifically directing them in their deliberations and decisions to promote, encourage and develop water transportation.

The Interstate Commerce Commission up to this decision has so construed said enactment.

We cite the following:

Tin Plate to Sacramento, 140 I. C. C. 643. The Commission was considering rates proposed by the railways which were lower than the then effective rates of competing water lines. The Commission canceled the proposed reduction and said (at page 647):

> "* * * It clearly would defeat the intent of Congress to foster transportation by water as well as rail in full vigor if in any case rail carriers were permitted, at little or no profit to themselves, to operate so as to deprive water carriers of traffic which they now enjoy, and upon which their continued existence depends to some extent."

In Iron and Steel Articles from Chicago District, 163 I. C. C. 369, the Commission said:

> "There is no provision of the act which gives us authority to relieve the carrier from complying with the provisions of section 3 whenever they desire to divert traffic from their water competitors to their own line, and even if we had such authority we could not exercise it here without defeating the declared policy of Congress to promote, encourage and develop water transportation service and facilities."

In Reduced Commodity Rates to Pacific Coast, 89 I. C. C. 512, 538:

> "The policy of Congress in this respect can be effectuated only under rate adjustments which will

permit of an equitable distribution of the available traffic."

Also, in United States War Department against Abilene and Southern Railway, 77 I. C. C. 317, the Inland Waterways Corporation sought to compel the railways to establish just and reasonable divisions of joint rates. The Commission, after quoting section 500, said (at page 353):

> "In view of the experience that the country has had with recurrent rail congestion and car shortages and with increased rates, the possibilities which these waterways offer as a means of adding to the sum total of transportation facilities and of providing a cheaper form of carriage are plainly of prime public impotance. Clearly everything that can be done ought to be done to give this experiment a fair opportunity to demonstrate its worth. * * * "

In Transcontinental Cases of 1922, 74 I. C. C. 48, 71, the Commission said:

> "It clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted; at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle."

In Consolidated Southwestern Cases, 123 I. C. C. 203:

> "To permit the rail lines from St. Louis, Chicago, Pittsburgh, Cleveland and other points to maintain

> rates so low as to deprive such water carriers of the traffic naturally theirs, is not in accordance with the spirit of section 500."

Other enactments of Congress demonstrate the same intent and purpose.

By the Inland Waterways Transportation Act (43 Stat. 360, 49 U. S. Code, Sec. 151) Congress provided for a corporation to operate over and along the Mississippi River and its tributaries in order to demonstrate the feasibility of inland water transportation and specifically provided that said facilities, when said purpose was demonstrated, should be sold to private persons or corporations and not to any person or company directly or indirectly connected with any carrier by rail.

A similar federal enactment is The Panama Canal Act of 1912 (37 Stat. L. 560, 566, now embodied in Section 5 [10] of the Interstate Commerce Act, 49 U. S. Code, Section 5), which makes it unlawful for any railroad to own or have an interest in a water carrier operating through the Panama Canal.

Section 8 of the Merchant Marine Act (41 Stat. 992, 46 U. S. Code, Sec. 867) indicates the same general intent to foster water transportation.

The decision of the three-judge court specifically finds that section 500 is "nothing more than a general statement of policy" (R. 99), but we answer that every statute and lawful enactment is of such character. Statutes which declare the intention of the lawmakers constitute the law of the land, and statutes, of necessity, are declarations of legislative discretion—policy and intent.

The genesis of this enactment we urge as significant. Congress, in the Transportation Act of 1920, undertook to deal with transportation. The first portion of this enactment was intended to take the railroads out of federal control.. Sections 400 to 441 were amendments to the Interstate Commerce Act and are portions of the particular law under which the Commission now functions, and as part and parcel of said enactment Congress incorporated title V, section 500. The entire bill was passed as a law with an enactment clause signed by the presiding officers of both branches of Congress and approved by the President of the United States. Said enactment, therefore, dealing with transportation and the functions, duties and powers of the Interstate Commerce Commission, was intended to be a mandate to federal administrative bodies having to do with said matters.

Under Senate Resolution No. 17, addressed to the Interstate Commerce Commission, said Commission was required to prepare a manuscript in form suitable to be printed, covering the text of those provisions of law which, first, are administered by the Commission, and, second, affect the Commission's work, powers or duties. This resolution was passed on January 28, 1927, and the Commission, in response to said request, transmitted to the President of the Senate of the United States under date of December 31, 1929, volumes designated "Interstate Commerce Act Annotated," and under the second requirement of the above resolution included in volume 4 the Transportation Act of 1920, including section 500, as being a provision of law which affects the Commission's work, powers or duties. It is also significant that the Commission incorporated in said volume the Sherman Antitrust Law.

We note the reading of section 500. It provides that water transportation is to be promoted (not eliminated), encouraged (not discouraged) and developed (not destroyed) in connection with the commerce of the United States, and also provides that both rail and water transportation are to be fostered and preserved in full vigor. The purpose, policy and intent of Congress contained in this enactment admit of no uncertainty. This law is binding upon federal agencies and instrumentalities, and it is positive that the particular federal agency to which this mandate is expressly addressed is the Interstate Commerce Commission and was intended to govern the actions, deliberations and decisions of said Commission.

This statute of necessity is more than a mere gesture and we urge that it is a positive direction which no administrative body of the Federal Government can ignore or set at naught, particularly in a decision which admits of this result.

The three-judge court decision states that this statute contains no immunity from competition (R. 99). Appellant has not and does not now make such a contention, but does assert that the statute guarantees competitive transportation facilities.

Under the Interstate Commerce Act the only rates which the Commission is authorized to prescribe are just and reasonable rates and if the Commission had established a just and reasonable rate for rail lines in this particular proceeding, and then by proper proceedings had established reasonable differentials for water lines, this would have exactly met the competitive situation and would have resulted in just and reasonable rates for both transportation facilities. This appellant is agreeable to the proposition that both rail and water lines can and should be able to compete for this sugar tonnage and upon a competitive basis. The rates authorized by the Commission are such as will "dry up the water movement" and "be a staggering blow to water transportation" and "take away the net earnings of the Federal Barge Line."

This particular statement affirms the contention here made. If the proposed rates will produce the result above indicated for a federal instrumentality which operates on Government money, pays no taxes or other expenses incident to private ownership, the apparent and patent result to this appellant and others similarly situated is certain. There was no occasion or reason for the Interstate Commerce Commission to authorize rail rates from the origins here involved to destinations north and south of the Ohio River from 1 to 11 cents lower than the competitive rate of the water-truck service. Heretofore, of the total tonnage of Class I Southern carriers and regulated barge lines) the rail carriers moved in excess of 95 per cent. The rail lines have reduced their rates on many commodities for the apparent purpose of taking from the barge lines tonnage which is available to water movement, and now as to sugar they desire to take from barge lines sugar tonnage. The rail carriers are not satisfied with traffic in excess of 95 per cent of the total tonnage moved. The relative importance of this sugar tonnage to the rail and barge line is exactly indicated in the Commission's report, wherein the Commission finds:

> "Its (appellant's) most important traffic is northbound sugar, which constitutes about one-third of its total tonnage and yields about 40 per cent of its total revenue. The Federal barge line is even more of a sugar carrier, sugar constituting about 50 per cent of its northbound traffic. * * * Although the sugar traffic in its present volume is almost vital to the existence of the barge line, it would constitute but a small part of the traffic of respondents [rail lines]. For the four years from 1928 to 1931, inclusive, the ratio of total tonnage averaged 1.4 per cent for the Illinois Central, 0.2 per cent for the Louisville and Nashville Railroad Company and 0.5 per cent for the Southern Railway Company (R. 46)."

The admitted result which will obtain under the rates approved or authorized by the Commission will be to take sugar tonnage from the water lines and cripple or eliminate water transportation.

The Court continues and says that there is nothing in this statute to indicate an intention on the part of Congress that a common carrier by water was to be given a preference in rates over a common carrier by rail (R. 99). This appellant does not make such a contention. The appellant is here contending for the right to continue in existence as a transportation agency and is contending that under the law the Interstate Commerce Commission has no right, power or authority by its decision to select rail lines as the sole transportation facility which is to carry the commerce of the United States.

The three-judge court continues and states that there is nothing to indicate that a shipper was to be required to pay for transportation of a commodity, where rail and water lines were in competition, a rate high enough to enable each carrier to operate at a profit (R. 99). This statement of the Court would be significant if it were not a fact beyond the peradventure of dispute that water transportation is an operation which can be conducted at substantially less cost than transportation by rail, and of necessity it is true that any rail rates which are below reasonable rates for water lines are below reasonable or compensatory rates for rail application. The Interstate Commerce Commission in various decisions has recognized this situation. We quote from Inland Waterways Corporation v. A. G. S. R. Co., 151 I. C. C. 126, 144:

"The barge line differentials are based upon the premise that the service costs less and is worth less than the rail service for which it competes."

As evidence of the effect that the rates approved or authorized by the Commission will have upon water transportation, we briefly quote from the testimony presented in behalf of the appellant in this cause undisputed by any testimony presented by appellees.

Mr. Howe testified "that giving consideration to the movement of sugar over the petitioner's line during the years that he has been connected with the company, that such reductions will result in the depletion of the company's revenue and to such an extent that will make the continued operation of the Mississippi Valley Barge Line Company an unprofitable venture" (R. 132). Also, "that if any sugar is to be moved over the barge line it will be necessary for the barge line to reduce its rates for its port to port movement lower than the rates justified or designated by the Commission in its decision and order for application for rail movement, and that such a reduction in its rates, giving consideration to the tonnage of sugar that it has moved in the past, will necessarily result in material and substantial depletion of its revenue" (R. 132), and in the opinion of the witness, "will render the continued operation of the barge line an unprofitable venture."

Mr. Safford states that he is familiar with the various tariffs that have been published and presented to the

Commission in connection with various rates which have been prescribed for the alleged purpose of meeting water transportation, and that the Southern lines, who are concurring carriers in Agent Emerson's tariffs referred to in the petition in the instant case, have since June, 1932, and from time to time proposed certain tariffs which have carried substantial reduction in rates on the following commodities: Bagging, canned goods, coffee, corn, cotton, glassware, paper and paper products, pulp (paper), rice, soap, sugar and tobacco. The rates on canned goods, cotton, rice, soap, tobacco, sulphur, corn, glassware, paper and sugar, published by the rail carriers since June, 1932, represent reductions in prior rates of from 15 to 45 per cent below rates theretofore fixed by the Interstate Commerce Commission as reasonable rates in various proceedings. The rates so reduced by Southern carriers are made solely upon commodities which move by barge lines to and via ports on the Mississippi and Ohio Rivers, and that Southern lines have not correspondingly reduced rates on other commodities which do not move in connection with the barge line (R. 135).

The evidence of appellant is positive, giving consideration to the tonnage moved and the revenues derived from sugar, that the reduction in the rates approved by the Commission will certainly cripple and eventually eliminate water competition. In order to encourage, develop and foster water transportation, as well as rail, some character of reasonable return is necessary in order that these competitive agencies may be kept alive. The history of rail rates in evidence in this case demonstrates the fact that the crippling or eliminating of water transportation has resulted in the shipper paying rail rates upon more than a substantially higher level.

This particular situation was recognized by the Honorable Joseph B. Eastman, member of the Commission and now Coordinator of Transportation, in his concurring opinion in Fourth Section Application 14734, in the following words (decided May 8th, 1933, not yet reported):

> "After the railroads swept the inland waterways practically clean of competitive traffic, two influences set in. One was a public demand upon Congress for an appropriation by the Government for waterways so that they would handle traffic more cheaply and efficiently. The other was a gradual revision of the railroad structure to a so-called dry land basis. This return of competition has so alarmed the railroads that they are clearly about ready to go back to their old policy of rate cutting, and have already made several moves in this direction. If they continue with this policy uncorrected, I have little doubt that they will eventually cripple their water competitors as they were crippled in days gone by."

This reference is especially significant since it was rendered just prior to the decision of the Commission in its Docket I. & S. 3814.

Section 500, being a statute, is more than a mere gesture; it is a positive direction which no administrative body of government can ignore or set at naught, particularly in a decision which admits that water transportation will be crippled or eliminated.

Appellant suggests that this Court has recognized this enactment as being a statute containing a mandate to the Interstate Commerce Commission. We refer to United States of America et al. v. Illinois Central Railroad Co., decided March 5th, 1934:

> "The Transportation Act, 1920 (U. S. C., Title 49, Sec. 142), declares the definite policy of Congress to be 'to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States' (C. R. I. & P. Ry. v. United States, 274 U. S. 29, 36). In the light of the situation disclosed by this report and of the policy declared by the act just named, Congress evidently prescribed the course of procedure which Section 3(e) requires."

We therefore urge that the orders of the Commission are unlawful and should be annulled.

THE ORDERS HERE COMPLAINED OF SANCTION A VIOLATION OF THE ANTITRUST LAWS AND ARE THEREFORE ILLEGAL.

Appellant in its petition alleges that the decision and orders of the Interstate Commerce Commission here in issue admittedly violate Sections 1 and 2 of the Sherman

Act (Act of Congress, July 2, 1890, c. 647, Secs. 1 and 2, 26 Stat. 209, U. S. Code, Title 15, Secs. 1 and 2).

Section 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. * * *"

Section 2:

> "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

The reductions in rates complained of by the appellant were initiated through concerted action of the various executives of the Southern lines who authorized their publishing agent to prepare, present and file drastic and sweeping reductions in the going sugar rate. Clearly this concerted action comes within the prohibition of the foregoing statute if it results in restraint of trade or a monopoly. Federal courts in considering these statutes have held that actual intent to eliminate competition is not necessary in order to make the acts unlawful. For the convenience of the Court we submit the following: O'Halloran v. American Sea Green Slate Company, 207 Fed. 189:

> "I acquit the defense of any willful purpose or

conscious design to violate this act; but this is no defense if the agreements made and their execution necessarily operate to unduly and unreasonably restrain trade or commerce among the several states."

To the same effect is United States v. Union Pacific R. R. Co., 188 Fed. 114.

Northern Securities Company v. United States, 193 U. S. 197:

> "In all prior cases in this court the Antitrust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce. In other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce."

Also, United States v. Knight & Co., 156 U. S. 1:

> "It is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end and to deprive the public of the advantage which flows from free competition."

The Commission by exact finding and inference clearly admits that the rates authorized will result in restraint of trade and commerce among the several states and that it will tend to produce monopoly in the trade and commerce among the several states. The exact statement of the Commission, which among others confirms this, is that the rates as applied to interior points alone

> "would probably bring respondents a heavy traffic, would stop a large part of the distribution of water-borne sugar and dry up much of the water movement" (R. 42, 43),

and that

> "if respondents succeed the barge lines will be dealt a staggering blow" (R. 46).

Under the evidence presented by the appellant we respectfully submit that the necessary effect of the rates approved by the Commission is immediately to cripple and eventually to put out of business this appellant and all other common carriers by water operated as private enterprises, and that the inevitable result is to create a monopoly in the transportation field and place same in the rail lines, which field is now served by both rail and water carriers.

We respectfully contend that another portion of the record in this cause clearly portrayed an exact intent on the part of the rail lines to eliminate water transportation. We refer to the testimony of the witnesses in behalf of appellant, which establishes the fact that the Southern lines who proposed these rates on sugar have since June, 1932, proposed certain tariffs which have carried reduction in rates of from 15 to 45 per cent on the following commodities, to wit: bagging, canned goods, coffee, corn, cotton, glassware, paper and paper products, pulp (paper), rice, soap, sugar, sulphur and tobacco. The rates on canned goods, cotton, rice, soap, tobacco, sulphur, corn, glassware, paper and sugar so reduced were rates which had been fixed by the Interstate Commerce Commission as reasonable rates in various proceedings. The reductions so made in said rates were alone upon commodities which moved by barge lines to and via ports on the Mississippi and Ohio Rivers. The same rail lines did not make corresponding reductions in other territories or on commodities which did not move in connection with the barge lines (R. 135).

As further evidence of this intent, we call the Court's attention to the finding of the Commission wherein the Commission specifically states that the rail lines "may consider even lower rates if those proposed are established and do not prove sufficiently effective" (R. 22). This suggestion is further borne out by the fact that the rail lines reduced rates which had been in effect without complaint for a period of eleven years, and the amount of the reductions proposed are significant and can be interpreted alone in accordance with this suggestion.

The Southern lines did not ask for Fourth Section relief and therefore would be required to blanket back the proposed rates to points as far south as Western Tennessee and Northern Mississippi, Alabama and Georgia (R. 39). If the rail lines had been sincere in an effort to meet water competition they would have proposed rates which bore a definite relationship to the going rates of standard barge lines, and if this alone had been their purpose they would have asked for Fourth Section relief in order to charge higher rates at intermediate points which were not directly affected by the port-to-port movement of the barge service. The above statement indicates another motive. The rail lines forego the level of reasonable rates to the intermediate points to destinations such as Chicago, St. Louis and Ohio River ports and blanket the rates back to the points above indicated, and this can only be reconciled with a purpose and intent to cripple water transportation. The purpose of the rail lines, we contend, is directed alone against the elimination of water-borne traffic, and this intent is to be carried into effect regardless of the revenues which will accrue to the rail lines for the service performed. This is evident by the fact above stated, that the rail lines under their proposal are still charging a 28 or 30 cent rate on sugar, carload, from New Orleans and Mobile, Alabama, to points in Northern Mississippi, Alabama and Georgia, and under their proposal would charge the same rates to Chicago and St. Louis, respectively, from the same origin. The rates by rail lines and the rates authorized which these lines are now charging on sugar evidence the fact that the rail lines have a definite and well-defined purpose and that the decision and order of the Interstate Commerce Commission brings this purpose to a successful conclusion.

The appellant is here contending that the orders of the Commission are unlawful, in that same permit and sanction a violation of the anti-trust laws.

The three-judge court decision disposes of this contention with the statement "that only the United States can sue to enjoin for an alleged violation of the anti-trust laws a combination of common carriers subject to the provisions of the Interstate Commerce Act with respect to a matter within the jurisdiction of the Interstate Commerce Commission," and cites for its authority the proviso contained in the act (U. S. Code, Title 15, Par. 26).

The proviso to which the Court refers reads as follows:

> "Provided that nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of this Chapter 1 of Title 49, Transportation, in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

The original bill as filed by appellant and the amended bill was brought alone against the United States of America and the Interstate Commerce Commission as defendants by virtue of the District Court Jurisdictional Act (36 Stat. 539, as amended, and 36 Stat. 542, as amended, U. S. Code, Title 28, Secs. 41 [28] and 46).

The rail lines mentioned in the caption voluntarily intervened in this proceeding at the time of the hearing before the three-judge court, and in an intervening petition in their behalf stated:

> "In accordance with the provision of Section 212

of the Judicial Code (U. S. C. Title 28, Sec. 47, Subdivision 27) we hereby enter the appearance of"

and then specifically named the rail lines presenting said petition and filed an answer in behalf of said rail carrier.

Appellant respectfully urges that it did not violate the statute to which the three-judge court refers in its decision. The suit was not instituted against common carriers; the suit as instituted was under authority of a specific federal statute against the United States and the Interstate Commerce Commission alone to annul and set aside a certain report and orders of the Interstate Commerce Commission. The rail lines voluntarily and in accordance with express authority of federal enactment entered their appearance in said cause as intervener. Therefore, and of necessity, the fact that rail lines came into this proceeding voluntarily cannot annul the exact authority under which this suit was instituted by appellant and make it impossible for this appellant to have a ruling by this Honorable Court as to whether or not a federal agency and instrumentality has rendered a decision which is admittedly contrary to the Sherman Act. If the theory of the three-judge court is correct, then rail lines under authority of a federal statute and in a proceeding of this character can at any and all times defeat such a proceeding by appearing as interveners in said cause.

We suggest that the Commission's findings lead to the positive conclusion that the rates in question will restrain

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commerce among the various states and tend to produce a monopoly in the rail lines, and that therefore the orders of the Commission are unlawful.

THE COMMISSION'S FINDING AND ORDERS VIOLATE THE PROVISIONS OF THE INTERSTATE COMMERCE ACT.

The appellant urges that the Commission, by specific findings, admits that its decision and order violate specific provisions of the Interstate Commerce Act. We quote:

> "If the schedules were approved the rate from New Orleans to Terre Haute, Indiana, for instance, would be reduced from 56 to 30 cents, while to Paris, Illinois, and nearby points the rate of 56 cents would remain."

The Commission, on the 80,000-pound minimum, increases this proposed rate from 30 cents to 34 cents. Terre Haute, Indiana, is 19.1 miles from Paris, Illinois. The spread between these two rates which the Commission permits and allows is 22 cents for a difference in distance of 19 miles, and is so great as to patently establish the fact that Section 3 of the Interstate Commerce Act is violated. The statement of the Commission with reference to this situation we contend affirms this conclusion. The Commission said:

> "No one who might be adversely affected appeared" (R. 47).

The positive inference of this statement is that the receiver of sugar at Paris, Illinois, is adversely affected, by reason of an undue preference given to Terre Haute in connection with the movement of sugar by rail. This is the sole excuse that the Commission gives. Another similar situation is specifically set forth in the Commission's decision, to wit, the rates that they approved from New Orleans to Davenport, formerly 62 cents, were reduced to 34 cents, and the fact that the rates from New Orleans to Des Moines, Iowa, "for a similar haul would remain 65 cents." The difference in distance is less than 100 miles. The Commission said:

> "Respondent is expected to deal with these situations upon their merits after our decision herein" (R. 48).

This statement of the Commission admits of the unlawfulness of the rate situation which the Commission's decision produces. There can be no question but if the rate to Des Moines of 65 cents is reasonable that the rate of 34 cents is an unreasonable minimum rate; that the two rates contrasted are discriminatory as against Des Moines and unduly preferential to Davenport. These particular examples are only typical of the entire situation which the Commission's decision brings about. We respectfully contend that no administrative body of government has a right to produce such an unlawful situation; and especially is this true when in its finding and orders it specifically calls attention to the violation of the Interstate Commerce Act. The disparity in these rates between these typical destinations cannot be cured by graduating the rates from one destination to another because that particular treatment would only shift the unlawful prejudice to points beyond. We respectfully contend that a court of equity cannot condone an apparent and admitted violation of the very act under which the Interstate Commerce Commission functions. Therefore, the decision of the Commission which admits of the situation necessarily violates existing law and is unlawful.

The decision and order of the Interstate Commerce Commission approved of rates from New Orleans to Jonesboro, Arkansas, as typical, of 34 cents per 100 pounds, 27½ per cent of the applicable first-class rate (R. 54). The rate on the same commodity from New Orleans to St. Louis approved by the Commission in its decision is 32 cents. St. Louis is a more distant point and therefore Jonesboro is intermediate to St. Louis by direct routes. Here you have a definite and direct violation of the Fourth Section as the rail lines in this proceeding do not ask for or request Fourth Section relief.

The Illinois Central Railroad presents an affidavit to the effect that this situation is protected by Fourth Section order No. 7542 (R. 161). The reading of this particular order makes it apparent that said order applied only to rates in effect in the month of November, 1925, and was not intended to apply to any future rate. This order was, therefore, only intended to protect the rate situation at the time the order was issued.

THE DENIAL OF APPELLANT'S MOTION FOR REHEARING, AND REARGUMENT OF THE COMMISSION'S DECISION AND ORDERS IN I. & S. 3814 WAS A DENIAL OF A RIGHT GUARANTEED TO THIS APPELLANT.

The petition alleges and the record discloses the fact that appellant prepared and forwarded, on July 25, 1933, to the Interstate Commerce Commission a motion for rehearing and reargument in connection with its Docket I. & S. 3814. There is no controversy raised, but that the motion alleged changed conditions that had resulted during the period from the hearing of said record up to the release of the Commission's decision on July 17, 1933, and that these changed conditions were exactly presented in said motion (R. 143-151). The changed conditions were:

1. Depression.
2. National Industrial Recovery Act.
3: Competition.
4. Regulation.
5. Clarification of the record.

This motion was denied by the Commission under date of August 3, 1933 (R. 143). Appellant contends that the denial of this motion was a denial of a right guaranteed by law, and for its authority cites the case of A. T. & S. F. Railway Co. v. United States, 284 U. S. 248. Appellees rely upon the decision of this Court in United States v. Northern Pacific Railway Co., 288 U. S. 490. The answers of the appellees do not allege that plaintiff's motion did not specifically and definitely set forth changed conditions. Their answer denies that the matters alleged in said petition were true. We respectfully urge that the motion was in proper form, contained proper and sufficient allegations and that the decision of this Court in the Santa Fe case is controlling. In the Northern Pacific case, supra, this Court gave slight consideration to the allegation of changed conditions and specifically found that appellees were guilty of laches in connection with the filing of said report, and specifically stated:

> "Though the order substantially reduced the carriers' revenue, we do not consider the merits of the application for rehearing as we think carriers' lack of diligence in bringing the matter to the Commission's attention deprive them of any equity complained of by refusal of their petition."

In the Northern Pacific case the rail lines delayed the filing of said motion alleging changed conditions from January 15, 1930, to February 3, 1932.

In the foregoing portion of this brief appellant has attempted to present the matters which were considered by the three-judge court in rendering its final decree. By reason of the fact that appellees have heretofore presented certain propositions with reference to the matters here in issue, and since the Court has reduced the time within which briefs are to be filed, we deem it proper to give consideration to these matters at this time.

PETITIONER HAS A LEGAL INTEREST AND RIGHT.

Section 500 of the Transportation Act of 1920 provides that it is declared to be the policy of Congress to "promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States." This particular enactment expresses the intention of Congress and is, therefore, the law. It expresses a mandate intended to promote the public welfare and to be in the public interest and, therefore, establishes a right in the intermediary through which this purpose is to be accomplished. Appellant has developed water transportation, service and facilities in connection with the commerce of the United States, and such a venture is to be protected in accordance with the mandate of said enactment. This gives a definite right and interest in appellant to seek redress if any administrative body of government fails to give effect to this enactment.

The further statement in said enactment that it is the policy of Congress "to foster and preserve in full vigor both rail and water transportation" indicates that this particular right of these transportation facilities and operations shall not be committed to one or the other, but that both have a right to the enforcement of this particular enactment.

By virtue of Sections 1 and 2 of the Sherman Antitrust Act, Congress, by a mandate, has declared that every contract or combination in restraint of trade or commerce among the several states is unlawful, and section 2 provides that any person who monopolizes or attempts to monopolize any part of the trade or commerce among the several states is guilty of an unlawful act. These particular enactments have heretofore been recognized by the Commission as matters which they must consider in determining matters within their jurisdiction.

We respectfully contend that this particular enactment gives to appellant a definite and positive right and that it may protect this right when any decision or determination by a federal agency has failed to give consideration to these particular enactments. This is especially true in the instant proceeding. Here the Commission in its decision admits that the rates proposed or authorized will result in a "staggering blow" to water transportation, and thus, by positive inference, admits that they will tend to produce a monopoly in rail lines.

Appellees have relied upon certain cases as supporting their contention that appellant has no interest sufficient to maintain this suit. Sprunt & Sons v. United States, 281

U. S. 249, was the decision principally relied upon. A consideration of this decision, and of the other authorities advanced by counsel will, we submit, show that they have no application to the case at bar.

In the Sprunt case proceedings were brought before the Commission by certain competitors of Sprunt to compel the railways to cease and desist from according to Sprunt so-called domestic rates on cotton shipped to his compressing plant. It was alleged that the domestic rates as applied to Sprunt were unduly preferential. The Commission so found, and prescribed certain new rates in substitution for the prior rates. It was held that Sprunt had no interest sufficient to maintain such an action.

> "**The appellants contend that there is no basis for the Commission's finding of undue prejudice and preference.** We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors. * * * In the case at bar the appellants have no independent right which is violated by the order to cease and desist. **They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination.**"

The first and last sentences above quoted furnish the key to this decision. The plaintiff's sole contention was that the rate which he had formerly enjoyed was not unduly preferential to him; he did not show, and he did not offer to show, that the rate prescribed by the Commission was in any way unduly prejudicial to him. Even granting that the former rate was not unduly preferential to the plaintiff, it did not follow that the existing rate was unduly prejudicial to him. Unless it was, no legal right had been infringed and no legal damage had been suffered. His only legal right was the right to a rate not unduly prejudicial, and he did not offer to show any infringement of that right.

The position of appellant is precisely the opposite. It alleges and shows that the existing rates violate its legal right, granted it by section 500, to continue in existence as a water carrier. There is nothing in the Sprunt case which could be construed as impairing its standing to bring this suit; on the contrary, we submit, a reading of that case serves rather to throw into relief the essential contrast between the two situations, and to make even more clear the legal interest of appellant to maintain this suit.

So for Edward Hines etc. Co. v. United States, 263 U. S. 143. The principles involved in that case were similar to those in Sprunt v. United States. A proceeding was brought before the Commission by certain jobbers of lumber to compel the railways to cease and desist from collecting certain penalty charges for the detention of freight cars. It was the custom of the jobbers, who in general did not own lumber yards, to use freight cars for storage purposes pending final sale of the lumber. The Commission found that the charges were unduly prejudicial and granted the relief sought. The plaintiff company, which was not subject to penalty charges, since it maintained its own yards, and which desired a continuation of the charges since they were a handicap to its competitors, brought suit to set aside the order of the Commission. It was held, as in the Sprunt case, that no legal right of the plaintiff had been invaded, and hence that the plaintiff had no legal interest sufficient to maintain the suit.

> "Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. **But plaintiffs have no absolute right to require carriers to impose penalty charges.**"

As in the Sprunt case the plaintiff here failed to show that the **absence of penalty charges** was unduly prejudicial to it. If they were not, even assuming that a continuation of the penalty charges would not have been unduly preferential to the plaintiff, it had not been damaged. The comments made with reference to Sprunt v. United States have equal application here.

There is one further matter which should be considered in connection with these two cases. Appellees appear to have relied upon a certain similarity between these cases and the case at bar—a similarity, which, upon consideration is, we submit, of an entirely superficial nature. In the Hines case it was held that plaintiff had suffered no legal damage although, as the Court said, it had been subjected "to such losses as are incident to more effective competition." A similar statement was made in the Sprunt case.

From these two statements, appellees, leaving entirely aside the basic reasons why legal damage was found not to exist in these cases, apparently have drawn the inference that the loss sustained by appellant cannot be considered as legal damage since it is a loss incurred, in a sense, because of more effective competition. Appellant readily concedes that the removal of a competitive advantage, or even the diminution of a competitive equality, to which a party has no legal right, does not give that party any standing in court. No legal right, in such a case, has been invaded, and therefore no legal damage has been suffered. That, however, is very different from appellant's situation. It has suffered legal damage by virtue of the invasion of a legal right to continued existence. That fact is not altered by the circumstance that this damage takes the form of a loss of traffic to competing rail lines. The essential question, in considering whether legal damage has been suffered, is not, we believe, whether the loss complained of has occurred through a disturbance of competitive relations, but is whether the loss, from whatever source it came, can be considered as an injury to a legal right. The Hines and Sprunt cases, we submit, did not hold that there was no legal damage because of the fact that loss had occurred through more effective competition; they held that, on the facts presented, no legal damage had been suffered **in spite of** the fact that loss undoubtedly had occurred through more effective competition. They held, in other words, that loss sustained through more effective competition, in and of itself and without more, does not necessarily constitute legal damage. That is very different from holding that because the loss had there occurred through more effective competition it could not be considered as legal damage.

The Chicago Junction case, discussed below, serves as a clear illustration of the point. There the plaintiff's damage undoubtedly occurred through the more effective competition made possible to the New York Central by its ownership of the terminals in dispute, yet it was held by this Court that the plaintiff railroads had been subjected to legal damage, and therefore that they could maintain their suit.

Counsel for appellees have relied upon Atchison etc. Railroad Company against United States, 279 U. S. 768, as determinative of the proposition that appellant has suffered no legal damage and, therefore, cannot maintain its suit. That case merely held that the plaintiff railroad had no vested right to move southbound grain traffic from Kansas City merely because it had brought the grain into Kansas City previously from Western points of origin. Appellant does not contend that it has any vested right to the movement of any particular traffic from a point to which it has previously carried such traffic, but contends that it does have a right to continue in existence.

Appellees have also relied upon Pennsylvania Railroad Company v. United States, 40 F. (2d) 921, and Indian Valley Railroad v. United States, 52 F. (2d) 485. The facts and holdings of these two cases are so closely similar that a discussion of the former will be sufficient to indicate the nature of both. A certain railway applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing it to construct a branch in the territory then served alone by the plaintiff railway. By an order of the Commission the certificate was granted and the plaintiff sought to annul this order. It was held that the plaintiff had no standing in court, on the ground that it had suffered no legal damage, since it had no legal right to be the sole carrier serving this territory. The Court said that there was nothing, either in the unwritten or the written law, implying that such a right in any carrier existed, but that on the other hand

> "* * * the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service * * *."

In the case at bar the contrary is true. There is no denial in the law, written or unwritten, of a legal right in appellant to continued existence; on the contrary, there is a positive assertion of that right in the statutes elsewhere discussed.

There is a further distinction. In the cases cited by counsel the plaintiff sought to maintain its position as sole carrier in a given territory; in the case at bar appellant seeks only to maintain its existence as one of many competing carriers. It does not seek to obtain a monopoly; it seeks only to prevent a monopoly.

THE THREE-JUDGE COURT HAD JURISDICTION TO ENJOIN, SET ASIDE AND ANNUL THE ORDERS HERE COMPLAINED OF.

It has been urged that the orders of the Commission here complained of are negative in character and, therefore, that it is not within the jurisdiction of this Court to set them aside. Such an argument may at first glance appear to find support in Procter & Gamble v. United States, 225 U. S. 282, and certain other decisions of this Court cited by appellees, but it is submitted that on closer examination these cases, qualified as they have been by later decisions, clearly do not control the case here presented.

In Procter & Gamble Co. v. United States, relief was sought by the plaintiff shipper before the Commission from certain demurrage charges alleged to have been in violation of the Interstate Commerce Act. The Commission, within its province and jurisdiction, found the charges lawful and denied relief. Suit was brought in the Commerce Court to annul the Commission's order and enjoin the railroads from collecting the charges complained of; the Court dismissed the bill on the merits. On appeal it was held that the only orders of the Commission which the Commerce Court had jurisdiction to enjoin were those affirmative in nature; that this order was negative and therefore that the bill should have been dismissed for want of jurisdiction. In reaching this conclusion Mr. Chief Justice White, who wrote the opinion of the Court, relied principally upon two lines of reasoning: First, that upon the construction of the phraseology of the statute authorizing suits to enjoin orders of the Commission only such orders as were capable of affirmative enforcement were subject to be enjoined and, second, that it would be impolitic and contrary to the spirit of the Interstate Commerce Act to allow

> "* * * courts as an original question, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act" (page 297).

It appears from later decisions of this Court, presently to be discussed, that the first of these reasons has been abandoned to such an extent that it no longer applies to a situation such as is here presented; and we will attempt to show in a subsequent portion of this brief that the second reason also has no application to the case at bar.

Two years after the Procter & Gamble decision had been handed down this Court per Mr. Chief Justice White, decided the Intermountain Rate Cases, 234 U. S. 476. These were suits brought to enjoin enforcement of an order of the Commission under the following circumstances. Immediately subsequent to the amendment of the fourth section of the Interstate Commerce Act in 1910, certain railways applied to the Commission for fourth section relief to continue in effect rates then operative which would become unlawful by virtue of the amendment unless the relief sought were granted. After a hearing the Commission entered an order dividing the territory under consideration into zones, denying application for relief as to certain of these zones and as to certain other of the zones authorizing the railways to establish rates lower to terminal points than to intermediate points, provided that the intermediate rates should not exceed the terminal rates by certain designated proportions. The railways brought suit in the Commerce Court, praying, among other things, that the order of the Commission, in so far as it denied relief, be enjoined. It was urged by the United States that the order was negative and, therefore, not reviewable. The lower court granted an injunction. On appeal this was reversed on the ground that the Commission's order was sustained by the facts on which it was based. This Court, however, expressly held that the order was in its nature subject to injunction if erroneous, on the theory that when relief under the law and the facts should be granted, its denial is, in substance, an affirmative order:

> "* * * the right to petition the Commission conferred by the statute is positive, and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative, since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist" (page 490).

It might be urged that the last part of the Commission's order providing that rates should not exceed certain specified proportions rendered the order affirmative as against the railways and thus explains the decision. The answer to such a contention is found in the history of a contemporaneous case.

Shortly after the Commerce Court had rendered its decision in the Intermountain Rate Cases and pending any decision on these cases by this Court, to which they had been appealed, a similar application to the Commission for fourth section relief was made by the Louisville & N. R. Company. Relief was denied by the Commission, the application being refused without qualification. Petition for an injunction of the Commission's order was filed before the Commerce Court and the bill was dismissed on the ground that the order of the Commission was negative, and hence, that the Court lacked jurisdiction. The Commerce Court, which previously had taken jurisdiction in the Intermountain Rate Cases, distinguished the Commission's order in the latter cases from the order then before it, on the ground that the order in the Intermountain Rate Cases was affirmative in the respect above noticed, whereas there was no affirmative element in the Commission's order then before it (Louisville & N. R. Company v. United States, 207 Fed. 591). An appeal was taken from this ruling and, pending appeal, this Court rendered its decision in the Intermountain Rate Cases. It evidently was considered that this decision covered the question of jurisdiction in the Louisville & N. R. case, since upon confession of error the latter case was remanded to the District Court, the Commerce Court in the meanwhile having been abolished (Louisville & N. R. Company v. United States, 238 U. S. 642). The District Court took jurisdiction but denied relief on the merits (225 Fed. 571), and the case was affirmed by this Court on appeal (245 U. S. 463).

These two cases definitely hold, then, that an order of the Commission denying relief is subject to injunction. Such a holding, we urge, overrules the Procter & Gamble case in respect to the first ground of that decision. Whether or not an order of the Commission is subject to affirmative enforcement was the criterion prescribed by the Procter & Gamble case to determine whether such order could be enjoined. Clearly the order of the Commission involved in Louisville & N. R. Company v. United States was not such an order and yet this Court held that it was subject to injunction.

In a line of cases subsequent to the Intermountain Rate Cases and continuing to the last term of this Court the Procter & Gamble case has been further modified.

One of the most significant of this line of decisions is the Chicago Junction Case, 264 U. S. 258. In this case the New York Central Railroad applied for and obtained an order of the Commission authorizing it to purchase the C. R. & I. Railroad and to lease the Chicago Junction Railway for ninety-nine years. Under the Transportation Act of 1920 it was necessary to obtain this authorization in order for the transactions to be legal. The order was opposed before the Commission by five competing railways but was granted, and immediately thereafter one railway was purchased and the other leased. The competing railways then brought suit to have the order annulled, the sale and the lease set aside, and for an injunction. The Court granted relief. On the question of whether or not the Commission's order was negative and therefore not justiciable, it said:

> "Nor would the further fact that the order is permissive preclude review if by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited" (page 263).

It will be observed, then, not only that orders denying affirmative relief but also orders granting permissive relief may be enjoined. The enjoining of these orders is clearly contrary to the standard originally prescribed by the Procter & Gamble case.

It is submitted that the Chicago Junction Case is conclusively determinative of the present case. In the former an order granting permission to do something which otherwise would have been unlawful was annulled. In the present case appellant seeks the annulment of an order permitting the railways to establish certain rates which otherwise, because of the Commission's prior suspension of these rates, could not legally be established, and which rates by reason of the invalid order of the Commission are in and of themselves unlawful. The facts in both cases, as far as the question under consideration is concerned, are identical, and the Chicago Junction Case would seem, therefore, to be controlling.

Three months after its decision in the Chicago Junction Case this Court handed down its opinion in United States v. New River Co., 265 U. S. 533, which, also, it is submitted, exactly covers the present situation and answers any contention that the courts lack power to annul and set aside the order complained of by appellant. In that case an injunction restraining enforcement of an order of the Commission was granted under the following circumstances: Prior to 1921 the railways had in effect "rule 4" in regard to the relative distribution of cars as between joint mines (mines located on more than one carrier line) and local mines (those located on one line only). Rule 4 permitted a joint mine, in making application for daily car service from the two carriers on whose lines it was situated, to apply to either carrier for any proportion of the cars to which it was entitled on the basis of the daily production rating of the mine, but the combined application to both carriers could not exceed 100 per cent of its daily rating. The so-called 150 per cent rule, however, permitted a joint mine to apply for 75 per cent of its daily rating from both carriers, subject to the limitation that it was not entitled to receive in the aggregate more than its daily rating. The latter rule was more desirable to owners of joint mines since, in case of a car shortage, each mine was given only a ratable proportion of the cars applied for. In 1921 certain owners of joint mines filed complaints with the Commission attacking rule 4 as unduly prejudicial to the joint mines on the ground that it did not give such mines the full advantage of their location on more than one railroad. Division 5 of the Commission found that rule 4 was unduly prejudicial and that the so-called 150 per cent rule advocated by the owners of joint mines was not prejudicial. No formal order was entered, the Commission stating, however:

> "We have not required that car-service rules be filed as tariff schedules. We will not, in this proceeding, direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car-service rules so as to conform with our findings, and evidence same by filing copies thereof with us."

The defendant carriers amended their rules to conform to the findings of this report and put in force the 150 per cent rule. Later, on petition of owners of local mines, the case was reopened by the Commission en banc, which reversed the finding of Division 5 and found that rule 4 was neither unreasonable nor unduly prejudicial, and dismissed the original complaint of the owners of joint mines.

Thereupon the latter brought suit against the railways, the United States and the Commission "to enjoin the carriers from applying rule 4 and to set aside the order of the Commission." The lower court set aside the Commission's order and enjoined the Commission, the United States and the railways "from restricting the rights of appellees (joint mine owners) in accordance with the order and rule, or through any other order or rule to the same effect."

On appeal this decision was reversed on the ground that rule 4 was not unduly prejudicial. However, this Court first held that the lower court had jurisdiction to enjoin the order.

> "The mere fact that the order of the Commission dismisses the complaint of shippers against rule 4 does not make it a negative order. That rule, promulgated during federal control, was continued in effect upon the recommendation of the Commission until it decided, June 21, 1921, that the rule was unduly prejudicial to joint mines and unduly preferential of local mines, and that the carriers should distribute cars to joint mines on the basis of the 150 per cent rule. The

> Commission refrained from making an order that the rule be filed as a tariff schedule, but announced that it expected the carriers promptly to amend their car-service rules to conform with its findings. Accordingly, the carrier ceased to apply rule 4, and applied the 150 per cent rule in its place. When the case was reopened before the Commission, * * * the Commission reversed its former findings and decided in favor of rule 4, and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. **It is not merely negative. Clearly, the order permits and authorizes the carriers to apply rule 4. If that rule is illegal, as alleged, such permission and authority will not sustain it, and suit will lie to set it aside** (Chicago Junction case, supra). Plainly, it was the intention and purpose of the Commission that rule 4 should be applied in place of the 150 per cent rule. The effect of the order is to grant the relief sought by the operators of local mines. We hold that the District Court had jurisdiction" (page 541).

This case, in accordance with the Chicago Junction case, holds that an order authorizing a change in the status quo, even though it be merely permissive in nature, is substantially affirmative and, therefore, subject to injunction. The Commission's orders complained of in the present case, as indicated above, are precisely of this nature. To paraphrase the latter portion of the language above quoted, the effect of the Commission's orders in the present case is to grant the relief sought by the railways from the Commission's order suspending the effectiveness of the new tariffs filed by them. If it be urged that a suspension order is not a final order, the obvious answer lies in the fact that, in U. S. v. New River Company, supra, no formal order of any nature was entered prior to the order dismissing the complaint of the joint mine owners. In both cases the status quo was temporarily altered by the Commission's action and then realtered by a formal order denying the relief originally asked for. It is earnestly contended by appellant that if the Commission's order in the above case were affirmative in substance, although negative in form (and this Court held that it was), it must follow that the order of the Commission which appellant here seeks to have set aside is similarly affirmative in substance and, therefore, is an order reviewable before the courts.

A recent case holding that even though an order be negative in form if it be affirmative in substance it may be enjoined in a proceeding such as this, is Alton Railroad Company v. United States, 287 U. S. 229. The Alton Railroad and certain of its connecting carriers had agreed upon a division of "reshipping rates." The connecting carriers became dissatisfied with this division and, taking advantage of their strategic position as collectors of the rates at points of destination, reduced the amount paid to the Alton as its division. The Alton sought relief before the Interstate Commerce Commission which, after hearing, found that the new divisions put into effect by the connecting carriers were not unreasonable and refused to grant relief. In the same proceeding the Commission found that the division of certain other rates accorded the Alton were too low and ordered them increased. The Alton filed suit to set aside the former portion of the Commission's order denying relief. The lower court dismissed the bill on the ground that the Commission's order was negative in character and, therefore, not within its jurisdiction. On appeal this Court, per Mr. Justice Brandeis, reversed this holding. On the question of jurisdiction the Court said, at page 237:

> "The jurisdiction of courts to review orders of the Commission is not dependent upon the form in which the order is couched. If the eastern carriers had applied to the Commission for a change in the divisions fixed by agreement, and the commission had authorized divisions precisely like those which they are now imposing upon the Alton by their unauthorized action, the order would have been affirmative in form and would obviously have been subject to attack by the Alton in a suit in the federal court. By their unauthorized action the connecting carriers forced the Alton to become the moving party before the Commission, with the result that the Commission's approval of the divisions effected by them was expressed in the form of a refusal to interfere. This result of the alignment of parties does not endow the Commission's order with immunity from judicial review."

In the present case the carriers have, by filing illegally low rates, forced appellant as its only remedy to apply for relief before the Commission. A denial of the relief there sought, according to Mr. Justice Brandeis, although it may be negative in form, is clearly an order affirmative in substance and, therefore, subject to be enjoined by this Court.

From the four cases above discussed it is clear, we believe, that the standard prescribed by the Procter & Gamble case as to whether an order is subject to injunction has definitely been abandoned. None of the orders held subject to injunction by this Court in the four cases discussed was capable of affirmative enforcement. Therefore, even if the orders here complained of be construed as merely permissive in nature, that fact does not preclude appellant from injunctive relief. Moreover, from the above cases it is also clear that the fact that the Commission's orders here complained of are in some respects orders dismissing a prayer for affirmative relief does not prevent them from being annulled.

It has been stated above that the second ground relied upon by the Court in Procter & Gamble v. United States has no application to the present situation. It will be recalled that the relief sought in that case was against the alleged unreasonableness of certain demurrage charges sought to be collected by the railroad. Whether or not they were unreasonable depended upon a proper construction of the Interstate Commerce Act alone. Mr. Chief Justice White, in outlining the second basis for his decision, stated that it was not within the power of the courts, in the absence of action by the Commission, to determine whether the terms of the act had been complied with.

"* * * it was never considered that there was

> power in the courts as an original question, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act" (page 297).

The legality of the action of the Commission in the present case does not depend solely upon whether its construction of the Interstate Commerce Act was proper. The matters here complained of are far broader in scope than matters the legality of which is governed solely by the Interstate Commerce Act, and the enforcement of which is entrusted to the Commission as a mere administrative function of that body. The rates sanctioned by the orders here complained of violate not only the Interstate Commerce Act but the Antitrust Laws and the declared policy of Congress, as set forth in Section 500 of the Transportation Act of 1920, that both rail and water transportation shall be fostered and preserved in full vigor. It is clear from the following language in Procter & Gamble v. United States that such a situation was not there contemplated:

> "The latter case (Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426) especially will serve to point out that where the power of original action by a court, without previous action of the Commission, was insisted upon, it was based upon the conception that the particular subject matter as to which such power was asserted was, by the express terms of the act to reg-

> ulate commerce, not embraced within the subject primarily confined by the act exclusively to the administrative authority of the Commission" (page 297).

In the present case appellant is not seeking alone to prevent an improper failure to enforce the administrative provisions of the Interstate Commerce Act but is seeking also to prevent a violation of two other acts of Congress, both of which are separate from, and independent of, the Interstate Commerce Act. Clearly, the relief here sought is not barried either by the letter or the spirit of the decision in Procter & Gamble v. United States.

Mr. Chief Justice White, in the Intermountain Rate Cases, made the following statement, which directly supports the contention here advanced:

> "It is, of course, true * * * that findings of fact made by the Commission within the **scope of its administrative duties must be accepted in case of judicial review**, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended, or have been exercised in such **an arbitrary** way as to amount to the exertion of authority not given—doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply **the right to abuse**, but, on the contrary, carries with it as a necessary incident the command that the limits of a sound discretion be not transcended; which, by necessary implication, car-

ries with it the existence of judicial power to **correct wrongs done by such excess**" (page 490).

An extended search by appellant has disclosed no cases in which a court denied injunctive relief against an order, the propriety of which depended upon something more than the terms of the Interstate Commerce Act and the operation of which invaded a substantial right of the plaintiff. Appellees have relied upon Manufacturers Railway v. United States, 246 U. S. 457. In this case application to the Commission was made by the plaintiff railway to compel certain trunk lines to establish with it both joint rates and divisions thereof. The Commission ordered the trunk lines to establish joint rates but refused to order any specific divisions, since it preferred to have the carriers reach their own divisions by agreement, if possible. The plaintiff brought suit to enjoin the Commission's order. It was held that that portion of the order which refused to establish divisions was negative, since it denied relief, and the case was dismissed for want of jurisdiction. It seems clear that the question of whether or not divisions should have been ordered by the Commission was solely one of administrative discretion and depended for its determination on a proper interpretation of the Interstate Commerce Act alone. The refusal of this Court to interfere with an order denying relief in such a situation is in entire consonance with the second line of reasoning adopted in the Procter & Gamble case, and this line of reasoning, as above indicated, has no application to the case at bar.

To summarize: The holding of Procter & Gamble v. United States to the effect that an order to be subject to injunction must be an order capable of affirmative enforcement, seems definitely to have been abandoned. The second line of reasoning advanced in the Procter & Gamble case, to the effect that an order of the Commission may not be enjoined when it is negative in form and deals with subjects solely within the jurisdiction of the Interstate Commerce Commission, and when its propriety depends upon a proper construction of administrative portions of the Interstate Commerce Act alone, and not upon questions of law aside from that act, has no application to the case at bar, since the order here complained of violates not only the Interstate Commerce Act but also the Anti-trust Laws and Section 500 of the Transportation Act. The Court is not here faced with a question of the reasonableness of demurrage charges or rate divisions—questions depending for their determination solely upon a proper construction of the act. Whether or not the order here complained of should have been entered by the Commission involves questions of policy as broad in scope as the questions involved in the Intermountain Rate Cases. The annulment of such an order, therefore, does not amount to a usurpation by the courts of functions entrusted solely to the Commission.

The cases above discussed indicate that if a definite right is invaded by a so-called order of the Commission, and if an irreparable injury results therefrom, the power of equity to grant relief cannot be limited and confined by virtue of the mere form of the order complained of. The Interstate Commerce Commission may determine rights under the Interstate Commerce Act, and orders within its jurisdiction, alone, may be subject to the test prescribed by the Procter & Gamble case, yet equity will not stay its hand when a definite right, which limits the Commission in the exercise of its powers, has been denied. Not only is intervention by the courts entirely proper, but it is imperative if irreparable injury to appellant is to be prevented, and if two of the most important policies of Congress—the fostering of water transportation and the prevention of monopolies—are to be upheld. Therefore, both upon precedent and upon principle, appellant submits that it is entitled to the relief which it seeks.

THE MATTERS INVOLVED IN THIS APPEAL ARE NOT MOOT.

It has been alleged in the answer of appellees (interveners) that the question here involved is moot, since the rates authorized by the order complained of have gone into effect. Such a contention necessarily would be based upon the theory that whatever disposition is made of this cause, no actual relief would be obtained by appellant.

We first discuss this matter giving no consideration to the fact that certain rail carriers have entered their appearance in this cause.

The Commission could (and upon an annulment of its decision and orders, its docket I. & S. 3814, would be under a duty to) require rail carriers to take out the rates which became effective alone by virtue of its illegal decision and orders.

> "Whenever after full hearing, upon a complaint made * * * or after full hearing under an order for investigation and a hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any * * * rate * * * is or will be unjust or unreasonable * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * to be thereafter observed in such case * * *" (Act of Cong. Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 as amended; U. S. Code Title 28, § 15 [1]).

The Commission is empowered by this section to effect, upon its own initiative, a change in rates, even though no proceeding relative to such rates is then pending before it, and even though no complaint respecting the rates is then lodged with it. Upon an annulment of the order here complained of, it would be the duty of the Commission to exercise this initiative. The question, therefore, is not moot, since effective relief to your petitioner would result from an annulment of the Commission's orders.

Even assuming, however, that the Commission would have no duty and no power upon its own initiative to take action in regard to these rates, the question still is not moot. Upon annulment of the present orders, appellant, or anyone similarly situated, could file a complaint before the Commission, and the Commission, in acting upon said complaint, would be bound by the principles announced by this Court in its order of annulment. It may be urged, because under this theory a separate proceeding would have to be brought by your petitioner before complete relief could be obtained, that the questions involved in the present proceeding are, therefore, moot. The contrary has been held. In Technical Radio Laboratory v. Federal Radio Commission, 36 Fed. (2d) 111, the plaintiff made application for a renewal of its radio license. Under the practice before the Radio Commission, the term of such renewals was three months. The Commission refused the plaintiff's application. The plaintiff appealed to the Federal Court and, pending disposition of the case, the three months period elapsed. It was contended, therefore, that the case had become moot. The Court, however, overruled this contention:

> "It is argued on behalf of the Commission that this appeal presents a moot question because of the fact that the Commission may not issue a license for a longer period than three months; and that, if the Commission had issued the renewal license which appellant applied for, such license would long since have

> expired according to its own terms. It is argued that, since the period for which the license might have been issued has expired, this appeal has become moot, and should be dismissed. We do not agree with this contention. Such an interpretation of the act would practically nullify the right of appeal granted by Congress in such cases, for it is rarely possible for a station to secure a decision upon such an appeal within three months after the right of appeal accrues. This fact was of course well known to Congress when the statute was enacted. Moreover the relief sought by an applicant for renewal is not limited to the issue of a license for three months only, but includes a continuing right to apply thereafter at proper times for successive renewals thereof. That statutory appeal accordingly contemplates the restoration to the appellant, if his claim be sustained, of the continuing right to make such application to the Commission as he would have enjoyed had his application first been allowed. We feel justified, therefore, in entertaining the appeal" (p. 113).

It will be observed that in this case no complete relief could result directly from the Court's order; it was necessary, before the plaintiff could benefit by the Court's action, for the plaintiff to institute a new proceeding before the Commission. Yet the question was held not be moot. The Court rendered its decision so that when the plaintiff did appear again before the Commission he could do so fortified by a judicial decision as to his rights.

A recent decision by this Court has been urged by the defendants in respect to the question here involved

(Sprunt v. United States, 281 U. S. 249). In this case Sprunt had been accorded by the railways so-called "up-town" rates on shipments to his compressing plant. These rates were lower than the so-called "ship-side" rates. A proceeding was brought before the Commission by certain competitors of Sprunt, and, pursuant to their complaint, the Commission, within its jurisdiction, ordered the railways to cease and desist from according to Sprunt the up-town rates, because these rates were unduly preferential. The railways and Sprunt brought suit before a three-judge court to annul this order of the Commission. The suit was dismissed on the merits. Thereupon the railways put into effect ship-side rates to Sprunt's plant. Sprunt alone appealed from the ruling of the Court. It was held, since the ship-side rates had gone into effect, that the question had become moot.

> "A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so."

This decision, it is submitted, is distinguishable from the case at bar. Sprunt was not entitled to an unlawful preference. If this Court in Sprunt v. The United States had ruled upon the Commission's order it would have passed only upon the question of whether or not the former rate was unduly preferential to the plaintiff. An annulment of the order would merely have been a holding that the uptown rate, which the plaintiff sought to reinstate, was not unduly preferential. It would not have been a holding that the existing rate (the ship-side rate) was unduly prejudicial to the plaintiff. Therefore, a decision would not have helped the plaintiff's position in any respect. It would not, as in the case at bar, have imposed any duty upon the Commission to reopen the case and substitute a lawful rate for the rate then in effect, since there would have been no finding that the rate then in effect was unduly prejudicial. Nor, for the same reasons, would it have helped the plaintiff in any later proceeding he might have instituted before the Commission, since there would have been no adjudication by the Court of the illegality of the rate complained of. In the case at bar the contrary is true. The distinction between the two cases, we respectfully submit, is essential.

In the foregoing, we have discussed this matter as a general proposition having application to the rail carriers who have not entered an appearance. However, various rail carriers have entered their appearance in this proceeding. They have thus submitted themselves to the jurisdiction of the Court and may be enjoined from assessing, charging or collecting the particular rates here brought in issue. Therefore, this question is not moot, for the reason that the Court has jurisdiction of these parties and they may, by affirmative order, be required to cease and desist from applying the rates in controversy.

A further circumstance should be considered. Prior to the date upon which the rates authorized by the Commission's order were to take effect, the Commission was advised by appellant that it was to file this suit, and the Commission was definitely requested to postpone the effective date of the rates until an adjudication could be had before the three-judge court (R. 142). The Commission refused to do so. If the Commission had granted this request, no possible contention could have been made that the question here presented is moot. Assuming that the arguments above advanced are untenable and that the question has become moot, it became moot solely because of the deliberate refusal of the Commission to grant the requested postponement. It is inconceivable that a court of equity would hold itself powerless to grant relief in such a situation. It is clear from the following statement by Mr. Justice McKenna in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, that the courts will not allow a defendant thus to foreclose the rights of his adversary, and that if the question becomes moot through any fault of the defendant, a decision nevertheless will be rendered:

> "This Court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed" (p. 514).

In this case the Court rendered its decision, in spite of the fact that, in one sense of the word, the question passed upon had become moot. An order had been entered by the Interstate Commerce Commission commanding certain railroads to cease and desist, during a specified period, from a practice allegedly preferential. Suit was brought to enjoin an enforcement of the order. The trial court entertained jurisdiction and dismissed the bill on the merits. It was contended on appeal that since the Commission's order had expired, the case thereby had become moot. This Court, although it affirmed the decree of dismissal, first held that the case was not moot, on the ground that if it were held moot such a decision would enable the Commission, by the use of short-term orders, to defeat any opportunity of review.

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the Government, and at another time the carriers, have their rights determined by the Commission without a chance of redress" (p. 515).

In the above case there was no showing that the Commission was cognizant that the period which it had set for the duration of its order would preclude review. In the case at bar, as stated above, the Commission was fully advised of the situation at the time it refused appellant's requests for a postponement of the effective date of its order. In the present case, therefore, it is even more imperative than it was in the Southern Pacific case that a decision be rendered.

Leaving aside for the moment any question of further proceedings before the Commission, either upon the Commission's initiative or upon a complaint to the Commission by appellant, this case for an additional reason is not moot. The present rates went into effect, if our contention is correct, by virtue solely of an invalid order of the Commission. If the Commission's order is annulled, the rates now in effect clearly will be unlawful. The relief prayed for, therefore, will enable appellant to bring a suit in equity in a federal court against the several railways not now parties, to enjoin them from continuing in effect the rates objected to.

For these reasons, therefore, it is submitted that the matters here presented are in no sense moot, but present a justiciable controversy.

CONCLUSION.

Appellant therefore respectfully requests this Honorable Court to reverse the final decree of the three-judge court and by proper orders to require said court to enter a decree wherein and whereby the decision and orders of the Interstate Commerce Commission, its Docket I. & S. No. 3814, be annulled and set aside and Intervening Rail Lines be enjoined from charging the rates complained of.

Respectfully submitted,

GUY A. THOMPSON,
TRUMAN P. YOUNG,
J. R. VAN SLYKE,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation,
Appellant (Petitioner),
vs.
THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees (Defendants),
and
ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY and NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,
Appellees (Interveners).

No. 807.

Appeal from the District Court of the United States for Eastern Division of Eastern Judicial District of Missouri.

REPLY BRIEF OF APPELLANT.

This reply brief is filed under authority of this Court granted on April 6, 1934, and by reason of the fact that briefs of appellees (defendants) and appellees (interveners), were not received until immediately prior to the argument before this Court.

I.

Appellant is not contending that rail lines do not have the right to initiate rail rates, but is contending that when said rates are brought into an investigation by an order of the Interstate Commerce Commission then that the Commission, in passing upon said rates, must give consideration to mandates which were enacted to control the deliberations and decisions of the Commission.

II.

Appellant is not contending that this Court has the function or right to determine the character of rates which the Commission should have prescribed, but is simply asking that, by reason of the matters presented by appellant that the present orders of the Interstate Commerce Commission should be annulled.

III.

The orders of the Commission primarily involved in this proceeding are those authorizing rates on refined sugar, carload, 80,000-pound minimum, from Gulf ports to destinations in Missouri, Illinois and contiguous territory. The rates which the rail lines proposed for application were not approved, but the Commission in its order authorized the rail lines to establish in lieu of the rates contained in the schedules filed by the rail lines, the rates approved in the report referred to and, upon notice to the Commission and the general public, by not less than five days filing and posting, ~~but~~ not earlier than July 29, 1933 (R. 68). It is alone by virtue and authority of this order that the rates now charged by the rail lines are in effect. This order was affirmative in character and is the sole and only justification for the rail lines now charging the rates here complained of. This answers the contention of the appellees that the going rates are voluntary in character. The rail lines could not have prescribed any other rates than those authorized by the Commission without filing new schedules and could not have put these rates into effect on July 29, 1933.

IV.

The Commission found that the rail carriers were seeking drastic and sweeping reductions in rates, and intended to go even lower if proposed rates were not sufficiently effective; that no reductions were proposed in the barge-rail rates from Louisiana points to destination (which is significant because it shows that the all-rail rates alone were to be reduced); that the proposed rates to water competitive points and also interior points were generally lower than the water-truck combination; that the usual water-truck rates to points north and south of the Ohio River were from 5 to 15 cents higher than the proposed all-rail rates; that the proposed rates would stop a large part of the distribution of water-borne sugar, and dry up much of the water movement; that the proposed rates to competitive points, such as Chicago, were made solely with regard to water competition, but that the rates were to be blanketed back towards origin (the rates to St. Louis authorized by the Commission will blanket back to 300 miles north of Mobile or New Orleans); that sugar traffic, in its present volume, is almost vital to the existence of the barge lines, and constitutes but a small part of the traffic of rail lines, and that if respondents succeed the barge lines will be dealt a staggering blow. These particular findings are specifically referred to with record reference on pages 8 to 12 of appellant's original brief.

From these statements, we have definite and positive findings by the Commission of the exact effect that the proposed rates of the rail lines would produce. The going rail rate from New Orleans to Chicago was 56 cents. The rail lines propose a reduction in this rate of 26 cents. The Commission authorized a rate which resulted in a reduction of 22 cents. The rail lines propose a reduction of 24 cents in the 52-cent rail rate from New Orleans to St. Louis; the Commission authorized a reduction of 20 cents and the rates to other destinations proposed and authorized are in approximately the same relative amount. Therefore, the particular findings of the Commission with reference to the rates proposed are modified only in a very slight degree. To apply this to a specific finding of the Commission above referred to, the water-truck rates to interior points north and south of the Ohio River are from 1 to 11 cents higher than the rate authorized by the Commission for all-rail application.

The first finding above referred to is significant in this connection. The Commission states that the purpose of the rail lines is to seek drastic, sweeping and quick reduction in rates. The rail lines sought a decrease in the rail rates of approximately 46 per cent. They secured reduction in rates of approximately 40 per cent. This clearly indicates the exact extent of the rail lines' success in the proceeding before the Interstate Commerce Commission.

Out of the total tonnage moved by rail and barge lines, 95 per cent is moved alone by rail carriers. Of the remaining 5 per cent, sugar is a commodity which is available for barge line transportation, and this is the commodity involved in this proceeding. This particular commodity constitutes an insignificant portion of the total tonnage of rail lines (R. 46). It constitutes approximately one-third of the total volume of the appellant's traffic and 50 per cent of the total volume of the Federal Barge Line. The Commission's exact finding is that the proposed rates will wipe out the entire showing of net revenue of the Federal Barge Line and, if there is a reduced volume, it will cost it much more (R. 46). This clearly indicates the very positive and detrimental effect that the authorized as well as the proposed rates will have upon a privately owned enterprise such as is conducted by this appellant.

We, therefore, respectfully urge upon this Court that, taking each finding and taking said findings collectively as they were made, it is positive that the rates authorized will have a disastrous effect upon barge line operation.

A suggestion was made as to what the Commission exactly intended in its statement "If respondents succeed, the barge lines will be dealt a staggering blow" (R. 46). We quote the reading:

> "Protestanf urges that respondents have conspired in restraint of trade and in violation of the antitrust law to monopolize the traffic. If respondents succeed, the barge lines will be dealt a staggering blow. Protestant suggests that respondents can much better afford to forego this traffic than can the barge lines" (R. 46).

In this reading the Commission uses the term "protestant" in connection with the first and third sentences. If the Commission intended that the second sentence was a mere statement of protestant's contention it is apparent, giving consideration to the reading of the first and third sentences, that the Commission would have used the term "protestant" in connection with the second sentence. By reason of the fact that the Commission has not used the term "protestant," we respectfully and sincerely urge that, according to the exact reading and punctuation, this particular sentence must be construed as a finding of the Commission. The other findings of the Commission are to the same effect and all should be construed together.

V.

Appellees' briefs are addressed primarily to the proposition of "the extreme care" that the Commission took to determine these rates. This contention of appellees, we suggest, is exactly refuted by the findings of the Commission above referred to. The appellees base their contention upon, and call particular attention to, the rates which the Commission mentions of so-called contract barge operators. These particular rates under the Commission's finding are not satisfactory or customarily used by shippers. The service is not regular or dependable and the operators are financially irresponsible. This particular service carries less than one-tenth of the total tonnage of sugar moved by barge operators, and it is, therefore, apparent that these are not the rates which should be considered by anyone in order to justify or attempt to justify rates for rail applications. If the rates referred to in appellees-interveners' brief, which were quoted for contract barge service (a tow service alone from port to port), had been employed by certificated barge lines, or if this service had moved any considerable portion of the tonnage moving by river service, there would possibly have been some justification for these rates being considered and relative rates based thereon, but under the exact findings of the Commission this is not the situation. The Commission finds that the certificated barge lines moved nine-tenths of the total water-borne tonnage of sugar moving northbound from the origins involved and to the destinations considered. These rates when employed by contract barge operators affect the certificated barge lines as much or more than they do the rail lines, but the rail lines were not attempting in their proposal to meet the competitive rate of the barge lines, which were moving by far the major portion of this tonnage.

The Commission authorized a 34-cent rail rate to meet a competitive barge rate of 44 cents from New Orleans to Cincinnati and Louisville. It authorized a 32-cent rate to meet a competitive barge rate of 42 cents to Evansville and 39 cents to Cairo, and a 32-cent rate to meet the competitive rate of the Federal Barge line of 42 cents from New Orleans to St. Louis (R. 41).

To appreciate the full detriment to certificated barge lines of these rates authorized by the Commission to meet the competitive barge rates above indicated, the Court must give consideration to the fact that the Commission in its report recognizes the fact that barge lines cannot attract any tonnage to their service unless the barge rates are differentially lower than the all-rail rate.

VI.

The appellees also give consideration to the proposition that the Commission in the establishment of the level of the rates here involved was giving consideration to rates from the Atlantic Seaboard to Chicago. Our answer to this statement is that if the Southern Lines intended to meet the competitive situation at Chicago from the Atlantic Seaboard then they would have proposed rates to Chicago to meet this competitive situation and would have asked for Fourth Section relief in order to maintain reasonable rates at intermediate points. This the Southern Rail Lines did not do, but have proposed rates, and the Commission has authorized rates, to interior destinations which are not directly affected by the presence of navigable streams and in nowise affected by the Chicago situation. We give consideration to this exact proposition in our original brief on pages 50 and 51 and 70 and 71. The above statement further suggests that the rail lines are not actually attempting to meet a competitive rate even at Chicago, but are attempting to reduce the rates from these Gulf ports to Chicago and all intermediate territories, with the hope and expectancy that barge operations will disappear as transportation facilities.

VII.

Appellees, in their presentation, give consideration to Section 500 of the Transportation Act. They first state that it is merely a declaration of policy and is not addressed to the Commission "any more than to any other governmental body," and that it prescribes no standard for the Commission or any other governmental body to follow, and then state that the Commission gave consideration to this enactment. This enactment is not mentioned as such in the Commission's decision. However this may be, we contend that if the result which necessarily will obtain under the Commission's exact findings and orders is that water transportation will not be promoted, encouraged or developed in connection with the commerce of the United States and if water transportation will not be preserved in full vigor that then you do have a definite finding which violates a positive standard which federal enactment has prescribed.

VIII.

Reference to the appendix of the brief of appellees-interveners, page 91, sets forth Section 1 of the Interstate Commerce Act. Under this particular enactment all charges to be rendered in the transportation of property must be just and reasonable and every unjust and unreasonable charge is unlawful. Under section 15 (Appendix, p. 93) it is specifically provided that under an order of investigation instituted by the Commission that the Commission is "hereby authorized and empowered to determine and prescribe what may be the just and reasonable individual or joint rate." Under section 15a (Appendix A, this brief), as amended, it is prescribed that the Commission, in the exercise of its powers to prescribe just and reasonable rates, shall given consideration to certain particular matters. These particular sections are the only sections of the Interstate Commerce Act under which the Commission in the instant proceeding was authorized to perform a function under its delegated power. It was incumbent upon the Commission to determine and fix a just and reasonable rate, and the Commission failed and makes no finding that these rates are either just or reasonable. The appellees requested no finding that the rates authorized were just and reasonable, but requested the three-judge court to find that the rates were compensatory.

Under section 4 (Appellees' Appendix 91), it is provided that the Commission, in the exercise of its powers under the long-and-short-haul provision, may give consideration upon application and authorize a less charge for the longer than the shorter distance, but that, in the exercise of this authority, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed. This is the only provision of the Interstate Commerce Act where the term "compensatory" is used in connection with matters relating to the subject here under discussion. The rail lines did not ask for Fourth Section relief, and, therefore, the question of a compensatory rate by virtue of a long and short haul is not involved in this proceeding, and we further contend if a compensatory rate were involved in this proceeding that the rates here authorized are not compensatory and were not so found by the Commission and have given this matter consideration page 40 to and including page 54 in our original brief. The above contention is exactly acknowledged by the appellees-interveners on page 57 of their brief where they state that rates must be just, reasonable, nondiscriminatory, nonpreferential and nonprejudicial.

IX.

Appellees' direct attention to the proposition that our contention with reference to the antitrust law is not well founded, for the reason that the prohibition of this enactment is addressed to a contract. It is possible that we have not made ourselves plain. Under the Commission's decision, and under the facts of record in this case, it is certain that rail lines by concerted action joined together and proposed certain rates. It is certain that the Commission found that these proposed rates would result in a restraint of commerce between the states and would tend to produce a monopoly in rail transportation. The Commission found that said rates would dry up much of waterborne movement and made other finding to which we have referred. Therefore, there is an exact finding that the proposed rates were in violation of the Sherman Antitrust Law. The slight increase over the proposed rates, as heretofore considered, does not change this particular finding in its effect, and if there is any possible change it would only be in degree.

X.

It is suggested that the record before the Commission is not presented to this Court, and the suggestion is made that, therefore, the conclusions and findings of the Commission are conclusive. This Court has held where the allegation is made that there was no evidence before the Commission to support its finding, and the record is not presented, that the Court cannot determine these facts and that the presumption will be that the Commission acted under contradictory evidence and made a proper finding. It is our contention, however, that legal rights may not be denied or abridged by the Commission, and that the Commission, having made certain findings, that those findings are to be considered in connection with applicable law, and whether or not the Commission acted without evidence or heard all character of testimony does not change the situation and the proposition that we present. It is our contention that under the findings of the Commission it is admittedly acknowledged that applicable federal statutes which contain mandates to the Interstate Commerce Commission have not been followed, and that the Commission has refused and failed to follow these enactments. Therefore, the question as to whether or not the record before the Commission is before this Court is entirely immaterial.

We are contending that the Commission based its decision upon a mistake of law; that it refused to acknowledge the mandate of controlling federal statute, and, therefore, that it is invalid. We further contend that while the orders of the Commission are in form within its delegated power, yet the exercise of that power has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power (**Interstate Commerce Commission v. Union Pacific R. Co.,** 220 U. S. 540, 547; **Interstate Commerce Commission v. Illinois Central R. Co.,** 215 U. S. 452, 470).

The report and orders of the Commission, while within the pretended scope of its administrative duty, nevertheless admit that they violate the mandate of federal enactment and that the Commission arbitrarily asserted authority contrary to existing and applicable law. Of necessity, where discretion is conferred, this authority does not imply the right to abuse said discretion, and courts of equity carry as a necessary incident to their powers the right to command and require that the limitation of sound discretion be not transcended; which, by necessary implication, carries with it the existence of judicial power to correct wrongs done by such excess (**Intermountain Rate Cases,** 234 U. S. 476).

If we correctly interpret the real contention of appellees in this proceeding, it is that when Congress passed the Interstate Commerce Act that it gave to the Interstate Commerce Commission free rein to determine matters alone under and by virtue of that enactment, and that any subsequent statutes which are lawfully enacted by Congress are not to have any force or effect to change or modify the particular delegated power given by the Interstate Commerce Act and that, therefore, Section 500 of the Transportation Act is not a controlling mandate which is binding upon the Interstate Commerce Commission; nor the other federal enactments to which we have referred. We respectfully suggest that this is not the law.

Orders of the Interstate Commerce Commission which admittedly violate such enactments, we contend, are unlawful. We contend that the orders of the Interstate Commerce Commission in its I. & S. Docket 3814 are invalid.

Respectfully submitted,

GUY A. THOMPSON,
TRUMAN P. YOUNG,
J. R. VAN SLYKE,
Attorneys for Appellant.

APPENDIX A.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management, to provide such service.

(Act February 28, 1920, amended June 16, 1933.)

Office Supreme Court, U.
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No. 807

In the Supreme Court of the United States

OCTOBER TERM, 1933

THE MISSISSIPPI VALLEY BARGE LINE COMPANY, A CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

MARCH, 1934.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 807

THE MISSISSIPPI VALLEY BARGE LINE COMPANY, A corporation, appellant

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, Illinois Central Railroad Company, et al., appellees

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially-constituted District Court (R. 93), *Mississippi Valley Barge Line Co.* v. *United States et al.,* is reported at 4 F. Supp. 745. The report of the Interstate Commerce Commission (R. 19) *Sugar Cases of 1933,* is published at 195 I.C.C. 127.

QUESTIONS PRESENTED

The principal question presented is the validity of an order of the Interstate Commerce Commission, as amended, (R. 64, 67) the effect of which was to permit certain railroads to reduce their rates on sugar in order to meet water and water-and-truck competition.

Subordinate questions are (1) whether the order is violative of the congressional policy announced in Section 500 of Transportation Act, 1920, to promote, encourage and develop water transportation; (2) whether the Commission denied appellent a fair hearing; (3) whether the petitioner has such an interest in the subject matter as entitles it to maintain this suit.

STATUTES INVOLVED

Pertinent statutory provisions are set forth in the appendix.

STATEMENT

This is an appeal from a final decree (R. 107) of the specially-constituted (three-judge) District Court dismissing the appellant's bill which sought to enjoin and set aside the Commission's order of July 3, 1933 (R. 64), as amended by order of July 18, 1933 (R. 67), made in a proceeding entitled Investigation and Suspension Docket No. 3814, *Sugar from Gulf and South Atlantic Points* (*Sugar Cases of 1933*).

The proceeding was initiated by an order of the Commission itself, made under the provisions of section 15 (7) of the Interstate Commerce Act, in which the Commission entered upon hearings concerning the lawfulness of the rates, etc., stated in the schedules enumerated and described in said order, and which, among other things, suspended the operation of those schedules so far as they proposed changes in the rates on sugar, in carloads. (R. 64.)

By the schedules in question filed with the Commission to become effective October 1, 1932, on 30 days' notice, certain railroads, operating lines on both sides of the Mississippi River, proposed to reduce their rates on sugar from New Orleans and other southern refining points to destinations in the so-called Illinois district and certain intermediate points, the most important destinations being Chicago and St. Louis. (R. 35–36.)

The Mississippi Valley Barge Line Company, petitioner below and appellant here, and others, filed protests against the proposed reduced rates of the rail carriers (R. 2, 73), and these protests led the Commission to exercise its suspension power, and enter upon the hearings which were held shortly thereafter, for the purpose of determining the lawfulness of the proposed rail rates. (R. 36, 74.)

The railroads which had proposed the reduced rates in question were made respondents in the proceeding. Principal among these was the Illinois Central, operating a direct rail line from New Orleans to Chicago and serving water-competitive points such as Cairo, Ill., St. Louis, Mo., Peoria, Ill., Evansville, Ind., Louisville, Ky., and Cincinnati, O.

The Mississippi Valley Barge Line Company, which appeared as a party protestant, is a private corporation operating a line of towboats and barges on the Mississippi and Ohio Rivers and is engaged as a common carrier of freight, including sugar, between the ports of New Orleans, Cincinnati and St. Louis, and intermediate ports. This company, and several other barge lines, are in keen competition with the railroads serving the same ports and inland points beyond.

Other proceedings, four in number, relating to sugar rates, were also pending before the Commission at the same time and all were disposed of in one report entitled *Sugar Cases of 1933.* The scope of the five cases was described in the report as representing "collectively a contest among railroad, water, and motor truck carriers for that great volume of carload sugar traffic which moves from Atlantic and Pacific Coast and Louisiana cane-sugar refining points and from interior beet-sugar manufacturing points to central territory and certain middle western points, and particularly to Chicago, Ill., the country's largest market." (R. 21) The other four cases were Investigation and

Suspension Docket No. 3829, *Sugar from Eastern Points to Central Territory;* Investigation and Suspension Docket No. 3837, *Sugar from New Orleans to Arkansas, Missouri, and Oklahoma; Fourth Section Application No. 14080,* on reargument, relating to the transcontinental rates on sugar from San Francisco Bay points to Chicago, Milwaukee, St. Louis and related points; and *Fourth Section Application No. 14816,* relating to the rates on sugar from producing points in Colorado, Nebraska, Wyoming, Kansas, Utah, Idaho, Montana, Minnesota, South Dakota and Iowa to Chicago, Milwaukee, St. Louis and related points.

The five cases in the main embraced the same traffic as *Sugar Cases of 1922,* 81 I.C.C. 448, out of which came a general readjustment of the *all-rail* sugar rates, which stood without substantial modification for about 10 years. Then the conditions materially changed. "Into the transportation field have lately come new and powerful competitive forces in the form of water and truck carriers that maintain much lower rates than the rail carriers. They have made serious inroads on the traffic of the latter carriers and are threatening soon to take still more of it. To cope with the situation the respective sets of rail carriers serving the origin groups mentioned are here seeking, independently of each other, drastic, sweeping, and quick reductions in rates. They are doing so with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent." (Report, R. 21–22.)

The appellant seeks to enjoin only the order in I. & S. No. 3814, relating primarily to the rates from New Orleans. This case is dealt with separately in the Commission's report (R. 35–50) but frequent reference to the facts in that case is made in the discussion of the first case. (R. 23–35.)

Hearing was held at Washington, D.C., in October and November 1932, and a large volume of evidence was submitted, including evidence on behalf of appellant;[1] briefs were filed; the case was orally argued and on July 3, 1933, the Commission issued its report. (R. 102.)

A table in that part of the report relating to I. & S. 3814, (R. 38) shows the rates then in effect and the proposed rates. In each instance two rates were proposed, one based on a minimum carload weight of 80,000 pounds, the other based on a minimum of 60,000 pounds. These were proposed for contemporaneous application, and under them a carload weighing 80,000 pounds or more would take a lower rate than a car loaded only to 60,000 pounds. Of the proposed rates the most important were those to Chicago and St. Louis. These proposed rates were, to Chicago, 30 cents, minimum 80,000 pounds, and 39 cents, minimum 60,000 pounds (former rate 56 cents); to St. Louis, 28 cents, minimum

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[1] This evidence is not before the Court, nor was it introduced below.

80,000 pounds, and 34 cents, minimum 60,000 pounds (former rate 52 cents). The lower of the proposed rates, based on the 80,000-pound minimum, the Commission found, would be used on most of the traffic, as they would result in the lower per-car charges except on shipments weighing not much in excess of 60,000 pounds. "The protests and the record relate to them almost entirely," the Commission said, and "we will deal specifically only with these rates." The rates with the 60,000-pound minimum are to take care of dealers, principally at small interior points, who require limited quantities of sugar or whose storage facilities are limited. (R. 38.)

The Commission found (R. 50) that the respondents had justified the proposed rates with the 60,000-pound minimum. It further found (R. 50) they had not justified the proposed rates with the 80,000-pound minimum, but that they had justified rates 4 cents higher. "So far as the 80,000-pound minimum is concerned," the Commission said (R. 50), "this means all-rail rates from New Orleans of 34 cents to Chicago and 32 cents to St. Louis.

Accordingly, an order was entered, on July 3, 1933 (R. 65), vacating and setting aside the suspension order in I. & S. 3814 so far as it related to rates based on a minimum of 60,000 pounds. The same order required the respondents in I. & S. 3814 to cancel such of their schedules as named rates based on a minimum of 80,000 pounds.

Respondents accepted the Commission's finding that rates 4 cents higher than they had proposed on a minimum of 80,000 pounds had been justified, and on July 18, 1933, the Commission issued an amendatory order (R. 67) which authorized them to establish, in lieu of the rates contained in the schedules required to be canceled, the rates approved in the report, i.e., rates 4 cents higher than those originally proposed, based on the 80,000-pound minimum, such rates to become effective not earlier than July 29, 1933.

The same order fixed July 29, 1933, as the effective date of the previous order vacating and setting aside the suspension order so far as it related to rates based on a minimum of 60,000 pounds.

The rates based on the 60,000-pound minimum went into effect and became operative on July 29, 1933, and those based on the 80,000-pound minimum went into effect and became operative on July 31, 1933. (R. 77, 102.)

Proceedings in Court below

Bill was filed by the Mississippi Valley Barge Line Company to enjoin and set aside the Commission's orders of July 3 and 18, 1933, naming the United States and the Commission as defendants, and they filed answers. (R. 68, 73.) A number of the rail carriers who had been respondents in the Commission proceeding[2] intervened as defendants (R. 81) and filed a joint answer (R. 81). No one intervened in behalf of petitioner. Hearing was held before a three-judge court consisting of Circuit Judge John B. Sanborn and District Judges Charles B. Faris and Charles B. Davis, August 15, 1933.

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[2] Illinois Central Railroad Company; Louisville & Nashville Railroad Company; Southern Railway Company; Cin-

The Commission record was not introduced before the Court. The only evidence there offered consisted of a few affidavits that were offered by petitioner and two by the railroads. These affidavits have been narrated and appear in the record here under the heading "Statement of Evidence" (R. 129–163). These affidavits are again narrated in appellant's brief, pages 21–36, under the heading "Abstract of Testimony on behalf of Appellant." This testimony was not before the Commission. None of the evidence there is in this record. Attention is called to the statement in the record (R. 129–130), preceding the narration of the above-mentioned affidavits, noting our objection to these affidavits.

October 13, 1933, the Court rendered its opinion sustaining the validity of the Commission's order. (R. 93.) With respect to the Commission record, the Court said (R. 97):

> The record of the proceedings before the Commission has not been presented to this

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cinnati, New Orleans & Texas Pacific Railway Company; The Alabama Great Southern Railroad Company; New Orleans & Northeastern Railroad Company.

> Court, and the affidavits which have been received afford only an imperfect and incomplete picture of the situation. In view of the absence of the record of the evidence which the Commission had before it, we must accept its findings as conclusive. (Citing cases.)

The Court made separate findings of fact and conclusions of law. (R. 100.) Final decree denying the prayer of and dismissing the bill was filed November 21, 1933. (R. 107.) From the final decree this direct appeal was taken.

SUMMARY OF ARGUMENT

I. Appellant's principal contention, that the Commision's order is contrary to Congressional policy, is answered by the facts stated and found in the Commission's report, which show that the order, permitting certain reduced rail rates to be made effective, after full investigation disclosing that they were lawful rates, is in no respect violative of or inconsistent with that policy, which sought on the one hand to promote water transportation and on the other to foster and preserve in full vigor *both* rail and water transportation.

The Commission found that the proposal of the rail carriers to reduce their rates was to afford them equality of opportunity in their competition with the water lines, and that the rail carriers had proposed the reductions with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent, practically the entire sugar traffic from the New Orleans district having been lost to the water carriers. This loss of traffic was not due to superior transportation service by the water carriers but was due to the substantially lower rates maintained by them than by the railroads. The Commission further found that the rail carriers are in poor financial condition and need increased revenue. The Commission further found that the *proposed* rates were high enough to more than pay the cost of the service, from which it follows that the *approved* rates, substantially higher than those proposed, are sufficient to yield a wide margin of revenue above the cost of the service. While the Commision recognized that the loss of traffic by the rail carriers was a matter for its serious consideration, it yet did not overlook the rights of the water and truck carriers and the value of their services to the public. This is reflected in its action in declining to approve rates as low as those proposed by the rail lines. The contention of the appellant is, in substance, that the railroads should have been required to maintain their former rates, which were greatly in excess of the rates of the water carriers, so that the latter might continue to handle practically all of the sugar traffic. The action of the Commission in permitting the rail carriers to make reductions in their rates to put them on a basis of competitive equality with the water lines is not contrary to Congressional policy. That policy does not contemplate a rate adjustment that will enable the water lines to obtain practically all of a competitive traffic. The true policy, as shown by the applicable statutes, is that the rates shall be adjusted so as to be reasonable and fair to both rail and water carriers.

(a) No provision of Transportation Act, 1920, or of the Interstate Commerce Act guarantees to appellant that the rates of competing railroads will be kept high enough to enable appellant to maintain rates which, though differentially lower, are yet sufficiently high to enable appellant to continue in business as a profitable operation. Section 500, Transportation Act, 1920, is a declaration of policy in a statute containing numerous important provisions for the regulation of interstate commerce, administration of which is delegated to the Commission, and numerous expressions of the Commission show that it has regarded it as its duty to give effect in rate making and otherwise to the policy expressed. But it is manifestly impossible to spell out of the declaration in section 500 any guaranty that competitive railroad rates will be kept at any particular level. Numerous provisions in Transportation Act, 1920, and in the later enacted Denison Act, confer rights, remedies, and exemptions upon water lines and appellant is entitled to the protection afforded and advantages given by those specific provisions. But if the general declaration of policy were interpreted as affording a guaranty to water carriers of their continuance in existence as profitable operations, at all events, then the language of the declaration could be carried to vague, unreasonable, unlimited, and unforeseen lengths. Moreover, appellant's contention overlooks the declared purpose of Congress to foster and preserve railway transportation as well as water transportation. In the 1920 Act Congress enacted many provisions looking to the development and maintenance of an *adequate railway service* in the public interest. *Wisconsin R.R. Comm.* v. *C., B. & Q. R.R. Co.,* 257 U.S. 563, 585; *New England Divisions Case,* 261 U.S. 184, 189–190; *Dayton-Goose Creek Ry.* v. *United States,* 263 U.S. 456, 477–478. Recently the Congress has enacted the Emergency Railroad Transportation Act, 1933, "to relieve the existing national emergency in relation to interstate railroad transportation." The precarious financial condition of the railroads has not been due entirely to the economic depression, but in large part to competition of other transportation agencies, such as trucks, busses, and waterways. No provision of law prevents the railroads from meeting or attempting to meet this competition through the publication of reduced rates not violative of any statutory provision. It seems certain that there is nothing in section 500 of Transportation Act, 1920, relied upon by appellant, that prevents the railroads from making reductions in their rates, down to a level well above the cost of furnishing the service, nor that prevents the Commission from permitting such reduced rates when, after full investigation and ascertainment of the facts, the Commission is unable to find that such reduced rates are unlawful in any respect.

(b) The contention that the Commission's report admits the order sanctions a violation of section 500 is unfounded.

II. Appellant was accorded a full and fair hearing and the Commission's denial of its petition for rehearing was not an abuse of discretion. *A., T. & S.F. Ry. Co.* v. *United States,* 284 U.S. 248, is not apposite here. There were no fundamental changes in conditions during the short period intervening between the close of the hearing in the case at bar in November, 1932, and the date of the Commission's report in July, 1933. *United States* v. *Northern Pac. Ry. Co.,* 288 U.S. 490, 494.

III. No showing having been made that the Commission's order subjects appellant to legal injury, actual or threatened, appellant is without right to maintain this suit. Appellant, a common carrier engaged in transportation by water from New Orleans to points on the Mississippi and Ohio Rivers, competes with the railroads for traffic, and particularly for the sugar traffic under consideration. Although it protested against the proposed reduced rail rates, and was a party to the Commission proceeding, it is not a respondent to the order it here attacks, nor does the order make any requirement of it or in connection with it or its rates. The sole basis for its complaint is that since the Commission by its order declined to prevent the railroads from reducing their rates, and gave its authorization to the establishment of reduced rates, appellant's competitive position will not be as favorable in the future as it has been in the past. But appellant has no legal right, either by statute or at common law, to carry any particular share of prospective traffic. *Edward Hines Trustees* v. *United States,* 263 U.S. 143, 148; *A., T. & S. F. Ry. Co.* v. *United States,* 279 U.S. 768, 780; *Sprunt & Son, Inc.* v. *United States,* 281 U.S. 249. This case is therefore within the rule of *Edward Hines Trustees* v. *United States, supra,* holding that lumber dealers, who claimed the order infringed their rights both as shippers and as prospective carrier, could not maintain the suit, since they had no right to require carriers to impose certain charges. Similarly appellants have no absolute right to require their rail competitors to impose higher rates than those found lawful by the Commission.

ARGUMENT

I

The order in question, permitting rail carriers to put in force certain reduced rates proposed by them in an effort to regain part of the sugar traffic lost to competing water carriers, is a valid order, in no respect violative of or inconsistent with the Congressional policy to promote, encourage, and develop water transportation, and to foster and preserve in full vigor both rail and water transportation

Appellant's principal contention seems to be that the Commission's order is contrary to the policy of Congress enunciated in section 500 of Transportation Act, 1920, (U.S.C. Title 49, Sec. 142) which reads:

> It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

This contention is answered by the facts stated and found in the Commission's report.[3] These facts show that the action of the Commission complained of, that is, permitting certain reduced rail rates to be made effective, after full investigation which disclosed that they were lawful rates, is in no respect violative of or inconsistent with the policy of Congress which sought on the one hand to promote water transportation and on the other to foster and preserve in full vigor *both* rail and water transportation.

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[3] Since the evidence introduced in the Commission proceeding has not been put before the Court, the correctness of these findings may not be assailed here. *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U.S. 114, 116; *Nashville Ry.* v. *Tennessee*, 262 U.S. 318, 324; *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148; *C., I. & L. Ry.* v. *United States*, 270 U.S. 287, 295.

Until a few years ago the railroads transported practically all the sugar traffic in question. (R. 37.) But now the all-rail movement from Louisiana is confined almost entirely to occasional, special, or emergency shipments. (R. 37.) Nearly all of the Louisiana production sold in the destination territory in question and in contiguous territory goes *by barge* as far as St. Louis, Cairo, Peoria, Evansville, Louisville, Cincinnati, or Memphis, whence it is distributed to the interior (R. 36) by rail or motor truck. (R. 34.) In 1932 the barge movement amounted to over 500,000 tons, about ten times as much as moved all-rail from Louisiana points to the same territory. (R. 36.) By far the greater part of the water-borne traffic was carried by the Federal Barge Line, operated by the Government-owned Inland Waterways Corporation, on local rates or joint rates with the delivering rail carriers.[4] (R. 36.) A small proportion was similarly taken by the appellant barge line and some by the American Barge Line Company. (R. 36.) Tramp, or contract, barge operators also obtained considerable tonnage. (R. 37.)

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[4] It is significant that although the greater part of this traffic is handled by the Government-owned and operated Federal Barge Line, its officials did not protest to the Commission against the proposed reduced rates of the railroads. This is shown by the Commission report, which states, R. 46: "The Federal Barge Line see no good reason for respondents' proposal, but does not protest. Its policy is to let the rail carriers set the rate level."

The loss of this traffic to the barges was not due to superior transportation service afforded by them. For the Commission found that rail shipments generally reached destination in from four to six days, whereas water shipments are on the way two or three weeks. (R. 28.) "Rail service is also superior in that it is safer, involves less handling of and damage to packages, is more regular, and otherwise more dependable," the Commission found. (R. 28.) And further that "Water service is never more desirable than rail service, except for reasons of economy or where slow movement is desired as a substitute for storage or in the case of a rising market." (R. 28.) The Commission further said that "During these days when business men have to watch every penny there is a strong inclination to use the cheapest mode of transportation, even though not altogether satisfactory." (R. 28.)

Evidently the loss of this sugar traffic to the barge lines was due to the lower rates maintained by those carriers than by the railroads.

The all-rail rate to Chicago was 56 cents and to St. Louis 52 cents, minimum 60,000 pounds. These and all the other rail rates, as long as they were published in the carriers' tariffs and lawfully in force, were required to be strictly adhered to under the provisions of section 6 (7) of the Interstate Commerce Act and section 1 of the Elkins Act. Joint water-and-rail rates applying to through transportation partly by water and partly by rail under a common control, management or arrangement for a continuous carriage or shipment, are also subject to the provisions of those acts. The Mississippi Valley Barge Line Company, the American Barge Line Company and the Federal Barge Line, referred to in the Commission's report as the "standard barge lines", all applied to and obtained from the Commission a certificate of public convenience and necessity, under the provisions of section 3 (e) of the Inland Waterways Corporation Act. See *Through Routes and Joint Rates between Inland Waterways Corporation and other Common Carriers,* 153 I.C.C. 129, 172 id. 525, 181 id. 675, 192 id. 173, 192 id. 663; *Application of Mississippi Valley Barge Line Company,* 167 I.C.C. 41; *Application of American Barge Line Company,* 182 I.C.C. 521. And, as further required by said section 3 (e), the Commission fixed reasonable minimum differentials between the all-rail rates and joint rates in connection with the barge lines. For sugar the differential of the appellant was fixed at 10 cents under the all-rail rate. (See R. 38 and 167 I.C.C. 4.) This usually amounted to about 80 percent of the all-rail rate (R. 39) but this differential basis has not been strictly adhered to. Under a 10-cent differential, the joint water-and-rail rate from New Orleans to Chicago, when carried by appellant from New Orleans to a port of transshipment, such as Cairo or St. Louis, thence by a rail line to Chicago, would be 46 cents, as compared with the all-rail rate of 56 cents.

But the port-to-port rates of water carriers not owned or controlled by a railroad are not subject to the provisions of the act nor to the jurisdiction of the Commission. This is true even though they participate in some water-and-rail traffic that is subject to the Commission's jurisdiction. Thus the rates of the barge lines in question are wholly free from regulation so far as they apply from New Orleans to important destination points like St. Louis, Cincinnati, Louisville, Evansville and other ports on the Mississippi and Ohio Rivers, and now the great market of Chicago. (R. 27.) For this port-to-port traffic the water lines can make any rate they see fit. As said in the Commission's report in reference to water carriers so far as their port-to-port traffic is concerned,

> Being unregulated, they do not have to publish their rates, are free to change them at will without previous notice, may pay rebates, give allowances, make absorptions, provide storage, perform special services, allow special privileges, and otherwise, secretly or openly, favor individual shippers. (R. 25.)

It is shown that a great deal of the sugar traffic in question moves by barge to river landings and thence by truck to inland destinations. The rates for such transportation are wholly free from the Commission's jurisdiction. Likewise tramp, or contract barge operators, are wholly free from regulation.[5]

Not being bound by rigid rates, the appellant and the American Barge Line Company "took some sugar at lower rates than were charged by the Federal Barge Line." (R. 37.) They do not adhere absolutely to the usual differential basis on all traffic. (R. 37.) Tramp, hereinafter called *contract,* barge operators obtained considerable tonnage *at still lower figures.* (R. 37.)

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[5] In its 46th Annual Report to Congress (1932), at pages 20–21, the Commission said: "There is some demand for the further regulation of the rates and charges of water carriers. Their joint rates with connecting rail lines are under our jurisdiction, but not their port-to-port rates, except in instances where we have permitted rail carriers under the Panama Canal act to continue in control of water carriers. As we stated in our last annual report, the need for public regulation of these port-to-port rates is not a matter which we are authorized to investigate, and in default of thorough investigation we hesitate to express an opinion upon it. This much can be said, however, that information which has come to us in connection with our inquiries into rail rates suggests that there may often be an instability and uncertainty in these port-to-port rates, and a tendency toward purely destructive competition, which are opposed to the public interest as well as to the interests of competing rail carriers. The matter is one which we believe should be carefully considered by the Congress."

In respect of the Commission's jurisdiction over water traffic and rail-and-water traffic see *United States* v. *Munson S.S. Line*, 283 U.S. 43; *In re Jurisdiction over Water Carriers*, 15 I.C.C. 205; *I.C.C.* v. *Goodrich Transit Co.*, 224 U.S. 194; *United States* v. *N.Y. Cent. R.R.*, 272 U.S. 457; *Lehigh Valley R.R. Co.* v. *United States*, 243 U.S. 412.

Evidence of record indicated about what rates the contract barge operators charged, and the Commission's report found: "Rates from the New Orleans district to St. Louis as low as 19 cents on sugar have been quoted by contract barge operators for the movement of large cargoes and a rate of 18 cents for this service is regarded as compensatory by parties that should be in position to know, but, so far as appears, such rates have not been used. The contract rate generally paid by one of the principal Louisiana refiners was 20 cents. It covered only transportation and did not include loading, unloading, or marine insurance. The charges for these incidental items, according to one of respondents' witnesses, an official of the refiner mentioned, was between 3 and 4 cents, but according to protestant's witness, a traffic official of the Mississippi Valley Barge Line, they are more nearly 9 cents." (See Report, R. 40.)

Thus the contract barge rate from New Orleans to St. Louis, it may be said, was between 23 and 29 cents. Contrasted with this was the all-rail rate of 52 cents.

The great difference, as shown above, as between the rates for rail and water carriage accounts for the loss of practically all of this traffic by the railroads to the barges.

The basis for the amount of the proposed reduced rail rate of 30 cents from the New Orleans district to Chicago was the New York-Chicago water rate. (R. 39.) The southern rail carriers were confronted not only with the competition of the so-called standard barge lines and of the contract barge lines on the Mississippi and Ohio Rivers but also with the railroads and the water lines from eastern territory. There is a large movement of sugar to the central western destination territory from New York, N.Y., by the Hudson River, New York State barge canal and the Great Lakes. (R. 24.) There is also competition in that territory with sugar brought through the Panama Canal from San Francisco Bay points, with refined sugar from Havana, Cuba, by ocean steamer as far as Montreal, Canada, and thence by lake vessel to Chicago, as well as sugar by all rail movement from the west coast and from the far western beet sugar producing areas. (R. 24, 55, 58, 60.)

The proposed reduced all-rail rate of 28 cents from New Orleans to St. Louis was based on competition with the contract barge operators on the Mississippi River. (R. 39–40.) In respect of this movement in contract barges, the Commission said:

> The practice of shipping sugar in contract barges developed rapidly last year. At least one of the largest refiners resorted to it as a means of meeting the flood of sugar moving by water from the East and California. One refiner financed barge operations and

> was thus in position to dictate the rates to be charged. It furnished the contract barges with two-thirds of their sugar traffic. It expects to continue to ship much, if not most, of its sugar this year by barge even if the proposed rates are established. Such use as it would make of the all-rail rate would be during the winter. It seems to have no doubt about its ability to obtain a sufficient supply of contract water craft in the future. The refiners have had no difficulty in this respect so far. Just where they might find sufficient facilities to carry the bulk of the sugar in the future is not clear, but among other privately-owned facilities that may be available are those used for the southbound movement of steel. They were used to some extent last year. (R. 43–44.)

This situation caused grave apprehension on the part of the railroads. The Commission continued:

> Respondents are apprehensive about the situation and are convinced that it requires quick action. They fear that if the present tendency is not stopped all the refiners, to protect themselves, will use contract barges or provide their own barges for most of the traffic. Petroleum, steel, and cotton interests have already entered the river-transportation business to a greater or less extent. One of the main purposes of the proposal [to reduce the rail rates] is, therefore, to discourage the refiners in providing their own means of transportation or pat-

ronizing operators of the contract barges. The mere publication of the proposed rates has already deterred one refiner from increasing its river terminal facilities. (R. 44.)

The Mississippi Valley Barge Line suggested that the Commission hold the railroads to a rate of 40 cents at Chicago. (R. 39.) In other words, the rail rate from New Orleans to Chicago proposed by the appellant itself was 40 cents, and that proposed by the railroads was 30 cents. The Commission adopted neither of these proposals but fixed the rate at 34 cents.

The appellant further suggested that the Commission hold the railroads to a rate of 38 cents at St. Louis. (R. 41.) The railroads proposed 28 cents. Again the Commission adopted neither proposal but fixed the rate at 32 cents.

One *outstanding* probable effect of the proposed rail rate reductions, the Commission said, would be a narrowing of the amount of the standard barge-line differential. "The present standard barge-line rate from the New Orleans district to St. Louis is 42 cents, which is 80 per cent of the all-rail rate of 50 cents, before adding the surcharge, [the surcharge being 2 cents, making the all-rail rate to St. Louis 52 cents, see tabulation at R. 38] and the resulting 10-cent differential is reflected in the joint barge-rail rates from Louisiana origins to points beyond St. Louis, on which rate, incidentally, storage in transit is allowed, which permits distribution by rail from the river cities. Indications are that the differential is much too wide from a competitive-service standpoint, for, as we have seen, the standard barge lines are taking most of the business. If respondents are allowed to reduce their rates as proposed, the barge lines will consider the publication of rates differentially lower. If the 80-per cent basis were continued, it would reduce the differential from 10 to 5 cents. The standard barge rate to St. Louis would become 23 cents and the barge-rail rate to Chicago and other points beyond St. Louis, 25 cents, approximating some of the water rates from New York to Chicago. As already indicated, the traffic manager of one of the principal refiners testified that a differential of about 6 cents would probably afford the respective sets of carriers *equality of opportunity* with the barge line[s]. Others were silent. There is a suggestion from some protestants that respondents should have approached the standard barge lines on the subject of a reduction in the differential without the severe reductions in rates here proposed. But a mere reduction in the differential would not put respondents in any better position than they are now to meet the competition of the water lines from New York and the contract-barge competition from the New Orleans district." (R. 44–45.)

In the proceeding before the Commission the rail carriers urged that they should be left reasonably free in the exercise of their managerial discretion and that they were within their legal rights in attempting to put the proposed reductions in effect. (R. 22.) The protestants' contentions were principally that respondents had abused their managerial discretion, that the proposed reduced rates were not reasonably compensatory, that they were lower than competition justified, that they would unduly harm the water and truck carriers, disturb long-existing railroad rate relationships, bring on a collapse of the railroad sugar-rate structure, and result in needless sacrifices of revenue. (R. 22.)

The Commission definitely found "that the proposed rates are high enough to pay more than the cost of the service," (R. 49), and in support of this finding referred to the following facts: "The earnings would compare favorably with those of the eastern lines just considered [I. & S. Docket No. 3829, R. 23–35] and would generally accrue from single-line straightaway water-level hauls by economically and efficiently operated carriers in a territory of heavy traffic density. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240 per minimum carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26 cents. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15 cents per car-mile and 6 mills per ton-mile. The traffic considered would be principally added tonnage that could probably be carried at far lower costs. Many commodities are handled by respondents at much lower charges than they here propose for sugar." (R. 49.)

It is important to observe that in finding that the *proposed* rates were high enough to cover the cost of the service, the Commission had reference to the rate in the amount as proposed, not to the rate 4 cents higher that it found justified. The *proposed* rate, minimum 80,000 pounds, from New Orleans to Chicago, was 30 cents. This rate, the Commission said, as shown above, would yield $240 per minimum carload. Yet the Commission did not approve that rate. The rate from New Orleans to Chicago, minimum 80,000 pounds, which the Commission did approve, and which is now in effect, was 34 cents and that rate yields a minimum carload revenue of $272, or $32 per carload higher than the proposed rate of 30 cents which was found to be sufficient to pay more than the cost of the service. Under the minimum carload revenue of $272 the car-mile earnings would be 29.8 cents and the ton-mile earnings, on basis of the minimum weight of 80,000 pounds, 7.45 mills. It follows that the rate approved by the Commission yielded revenue materially higher than the cost of the service.

The most important of protestant's contentions, namely, that the proposed rates were lower than competition justified, was sustained by the Commission. It found that the rates carrying the 80,000-pound minimum, which were the important rates around which the controversy waged, were not justified. Some of the facts and considerations on which this conclusion was based are as follows: A differential of 6 cents for the standard barge lines under the all-rail lines, added to the 23-cent minimum contract barge cost, on account of the superior service of the rail lines, made 29 cents as a minimum rate from New Orleans to St. Louis, which was 1 cent more than the proposed all-rail rate. (R. 41.) "Accordingly, even without taking into consideration the fact that most of the river-borne sugar must be stored longer pending distribution, the 28-cent rate may be too low from a competitive standpoint. If the usual 20 percent differential were applied to that rate, it would reduce to 22.5 cents the standard New Orleans-St. Louis barge rate, which would apply for a much more regular and perhaps otherwise more dependable, desirable, and valuable service than the contract barge operators provide. It would no doubt stop the use of the contract barges." (R. 41.) The proposed rates to the water-competitive points as applied also to the interior points in the intermediate territory were generally lower than the water-truck combinations. (R. 42.) The proposed rates as applied to the interior points alone would therefore [assuming of course there were no corresponding reductions in the water or truck rates] probably bring respondents a heavy traffic, would stop a large part of the distribution of the water-borne sugar, and dry up much of the water movement. (R. 43.) For these and other reasons stated in the report, the Commission did not approve the proposed rates. The rates it did approve were substantially higher. For example, in the case of Chicago the approved rate (34) cents was *13⅓ percent* higher than that proposed (32 cents). In the case of St. Louis the approved rate (32 cents) was over *14 percent* higher than that proposed (28 cents).

The Commission found that the rail carriers "are in poor financial condition and need increased revenue." (R. 22.) As to the Illinois Central, the principal respondent, it found that the diversion of the sugar traffic to the barge lines in 1932 cost it probably half a million dollars in revenue. (R. 37.) Further, that "the prosperity of respondents depends upon that of the territory they serve and sugar refining is one of the principal industries on their lines in the South." (R. 37.)

But the Commission did not overlook the rights of the water and truck carriers and the value of their services to the public. It expressly so declared in its report:

> While the loss of traffic by the rail carriers is a matter for our serious considera-

tion, the rights of the water and truck carriers and the value of their services to the public must not be overlooked. This is particularly true with respect to certain barge lines operating on the Mississippi, Ohio, and Illinois Rivers under our findings of public convenience and necessity. See *Procedure under Barge Line Act*[6], 148 I.C.C. 129; *Through Routes and Joint Rates,* 153 I.C.C. 129; *Application of Mississippi Valley B. L. Co.,* 167 I.C.C. 41; *Application of American B. L. Co.,* 182 I.CC 521; and subsequent reports (R. 22.)

The proposal of the railroads to reduce their rates was to afford them *equality of opportunity* in their competition with the water lines. To repeat, for emphasis, what we have said once before, the Commission found that the rail carriers, in proposing reductions in their rates, had done so "*with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent.*" (R. 22.)

The position of the appellant comes to this, that the railroads should have been required to maintain their former rates, which were greatly in excess of the rates of the water carriers, so that the latter might continue to handle practically all of this sugar traffic.

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[6] Meaning the Denison Act, amending the Inland Waterways Corporation Act. The provisions of this amendatory act were recently before the Court, *United States* v. *Illinois Central R.R. Co.*, — U.S. —, No. 422, decided March 5, 1934, not yet reported.

The action of the Commission in permitting the rail carriers to make reductions in their rates to put them on a basis of competitive equality with the water lines is not contrary to congressional policy. That policy does not contemplate a rate adjustment that will enable the water lines to obtain practically all of a competitive traffic. The true policy, as shown by the applicable statutes read together, reference to which is made in the suceeding section of this brief, is that the rates shall be adjusted so as to be reasonable and fair to both the rail and water carriers.

(a) No provision of Transportation Act, 1920, or of the Interstate Commerce Act guarantees to appellant that the rates of competing railroads will be kept high enough to enable appellant to maintain rates which, though differentially lower, are yet sufficiently high to enable appellant to continue in business as a profitable operation

Appellant repeatedly asserts that the Commission's order deprives it of a right, given it by section 500, Transportation Act of 1920, to its continued existence as a common carrier by water. The contention is based largely, if not wholly, upon a statement made by a traffic official of the appellant, in an affidavit introduced before the court below (R. 130) to the effect that if any sugar is to move over barge lines, it will be necessary for the barge line to reduce its rate for the port-to-port movement lower than the rates justified or designated by the Commission in its decision and order for application for rail movement, and that such a reduction in its rates, giving consideration to the tonnage of sugar that it has moved in the past, will necessarily result in a material and substantial depletion of its revenue and, in the opinion of the affiant, will render the continued operation of the Mississippi Valley Barge Line an unprofitable undertaking. (R. 133–134.)

It may be, of course, that in any event, no matter what its rates were and regardless of what rates were maintained by the competing railroads, appellant would be unable to obtain sufficient sugar or other traffic to enable it to continue in operation as a profitable undertaking. But the facts seem to indicate that appellant may be able to make rates lower than those approved by the Commission for the railroads and yet high enough to yield a profit. Attention has already been called to the Commission's finding that the reduced rates as proposed by the railroads, e.g., 30 cents from New Orleans to Chicago, yielding a minimum per-car revenue of $240, are "high enough to pay more than the cost of the service" and that therefore the rates approved by the Commission, 4 cents higher than proposed, yield a substantial margin above the cost of the service, the rate of 34 cents from New Orleans to Chicago, as approved, yielding a minimum per-car revenue of $272. This finding is to be considered in the light of appellant's own admission, appearing on page 62 of its brief, that it is "a fact beyond the peradventure of dispute that 'water transportation is an operation which can be conducted at substantially less cost than transportation by rail." If this is so, it follows that appellant can make a rate differentially lower than the competitive rail rate and yet leave a wide margin of profit, provided of course it can obtain a sufficient volume of business. Reductions in its rates may attract more business in its competition with the contract barge lines and in the competition with the rail and water lines from the eastern seaboard and elsewhere. In this connection the following statement in the Commission's report is relevant:

> Respondents are here seeking not only some of the traffic which might otherwise move by barge lines from the New Orleans district, but naturally some of that which might otherwise come from different sources of supply, particularly that by water from New York and California. The prosperity of respondents depends upon that of the territory they serve and sugar refining is one of the principal industries on their lines in the South. The refiners are dependent for their existence largely on their sales beyond the Ohio River and respondents accordingly desire to keep the northern markets open to them. Incidentally, the barge lines have already done much to that end. (R. 37.)

Section 500 is a declaration of policy appearing in the Transportation Act, relating to numerous important subjects of interstate commerce, administration of which is confided to the Commission, and numerous expressions of the Commission show that it has regarded it as its duty to give effect in rate making and otherwise to the policy expressed. For example, in a very recent case, *Coal, Bituminous, Ex-River, from Colona and Conway, Pa.*, 197 I.C.C. 617, 633, the Commission said:

> The policy of Congress as declared in section 500 of the Transportation Act is to promote, encourage, and develop both rail and water transportation service and facilities. The ex-river rates naturally represent a part of a transportation that has taken place prior to the movement by rail. The barge or river service is unregulated by Federal authority as to charges for such service. Argument was presented that section 500 of the Act was not a mandate of Congress, but is merely an expression of policy to promote, encourage, and develop water-transportation service and facilities, and, at the same time, to foster and preserve rail transportation. Whether the expression of Congress is to be regarded merely as a policy, or otherwise, the fact remains that that policy, if it be merely a policy, has not been altered since the time of its expression, and it is our duty as an agent of Congress to carry out that policy consistent with existing law.

Reference to other similar expressions are given below.[7]

The question whether this is a right or wrong interpretation of the Congressional declaration is not in issue in this case. Compare *Ann Arbor R.R. Co.* v. *United States*, 281 U.S. 658, holding that the words of the somewhat similar declaration in the Hoch-Smith resolution "are more in the nature of a hopeful characterization of an object deemed desirable if, and insofar as, it may be attainable, than of a rule intended to control rate making." (*Ibid.*, 669.)

But it is manifestly impossible to spell out of the declaration in section 500 any guaranty such as claimed by appellant. And it confers no legal right upon appellant enforceable through judicial procedure. Other provisions enacted by the same act did confer many legal rights upon water carriers. For example, in the limitation upon the Commission's power to establish through routes and joint rates in section 15(4) of the Interstate Commerce Act, added by section 418 of Transportation Act, 1920, under which the Commission was prohibited from establishing any new through route which "short-hauled" a carrier (cf. *United States* v. *Mo. Pac. Ry. Co., Subiaco* case, 278 U.S. 269), an exception was made where one of the carriers in the route is a water carrier, the effect being to specifically authorize the Commission to establish new through routes under which a rail carrier is required to surrender traffic to a competing water carrier short of destination or short of the terminus of the rail carrier's line (see *Procedure under Barge Line Act,* 148 I.C.C. 129, 133; see also *Chicago R. I. & P. Ry.* v. *United States,* 274 U.S. 29, 34); and the Commission has established many such routes. (See *Through Routes and Joint Rates,* 153 I.C.C. 129, 172 id. 525, 181 id. 675, 192 id. 173; 192 id. 663, and others.)

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[7] *State of New York* v. *N. Y. C. R.R. Co.*, 95 I.C.C. 119, 130 (order sustained, *U.S.* v. *N. Y. C.*, 272 U.S. 457); *Reduced Commodity Rates to Pacific Coast*, 89 I.C.C. 512, 538; *Consolidated Southwestern Cases*, 123 I.C.C. 203, 341; *Transcontinental Cases of 1922*, 74 I.C.C. 48, 70–71; *Through Routes and Joint Rates between Ohio and Mississippi Transit Co. and Other Common Carriers*, 156 I.C.C. 724, 727–728; *Ex-Ohio-River Coal to Ohio Points*, 185 I.C.C. 211, 219; *Southern Pacific Transcontinental Cases*, 182 I.C.C. 770, 783–784, *Application of American Barge Line Co.*, 190 I.C.C. 177.

By section 15 (1) of the Act, also added by section 418 Transportation Act, 1920, the Commission was given the *minimum rate-making power* (the power exercised by the present order as to the proposed rates under which the Commission prevented the rail carriers from making rates as low as they desired) but, in order to give special protection to water-competitive transportation, Congress made an exception in the case of a through route where one of the carriers is a water line, as to which the Commission may prescribe only maximum rates. Consequently, while the Commission can control the lower level of railroad rates, it is without power to prevent a water carrier from maintaining a rate that is too low, even though the rate is a joint rail-

and-water rate subject generally to the Commission's jurisdiction. This limitation on the Commission's power, where one of the carriers is a water line, is repeated in par. 3 of section 15, in connection with the establishment of through routes and joint rates thereover. (See *Alan Wood Steel Co.* v. *Alabama G.S.R. Co.,* 190 I.C.C. 3, 11, 12. Of course the port-to-port rates of independent water carriers are in no respect subject to regulation by the Commission.)

An earlier provision, added by the Act of June 18, 1910, that enured to the benefit of water carriers, was the last paragraph of section 4, providing that: "Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." (cf. *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557.) (See also section 5 (19), (20) and (21) and section 6 (13), reproduced in the Appendix.)

Other rights were conferred upon water carriers by the Denison Act of 1928, amending and strengthening the Inland Waterways Corporation Act of June 7, 1924. This amendatory act, in section 3(e) provides that any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may, upon application to the Commission, obtain a certificate of public convenience and necessity in accordance with section 1 of the Interstate Commerce Act, and that the Commission "shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates," and shall, in such order, "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission." The Commission is further directed to require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of these differential rates, and if they are unable to agree within a time specified in the act, the Commission shall determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates.[8]

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[8] That the Commission has given full effect to this declared policy of Congress and to the provisions of the statutes enacted to carry this policy into effect is amply demonstrated by its reports in numerous proceedings under the statutes. The first of these was *U.S. War Department* v. *A. & S. Ry. Co. et. al.*, 77 I.C.C. 317; which deals comprehensively with the subject matter. A few subsequent reports are *Same* v. *Same*, 83 I.C.C. 742; *Same* v. *Same*, 92 I.C.C. 528; *Same* v. *Same*, 100 I.C.C. 491; *Same* v. *Same*, 144 I.C.C. 431; *Same* v. *Same*, 151 I.C.C. 91; *Same* v. *Same*, 155 I.C.C. 343; *Inland*

By these specific statutory provisions Congress has given water carriers numerous rights, remedies and exemptions. These specific provisions were enacted in furtherance of the declaration of policy made in 1920. For instance, the act of June 7, 1924, creating the Inland Waterways Corporation declared it was done so for the purpose "of carrying out the mandates of Congress prescribed in section 201 of the Transportation Act, 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of section 500 of such act * * *." (This act further declared the policy of Congress, in section 3(c), reproduced in the Appendix.)

Appellant is entitled to the protection afforded and advantages given by these specific provisions.

But if the declaration of policy were interpreted as affording a guaranty to water carriers of their continuance in existence as profitable operations, at all events, then the language of the declaration

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Waterways Corp. v. *C. G. W. R.R. Co.* et al., 129 I.C.C. 521; *Same* v. *Beaumont, Sour Lake & Western Ry. Co. et al.*, 142 I.C.C. 9; *Sugar Stored in Transit at Mississippi-Warrior Service Ports*, 146 I.C.C. 382; *Inland Waterways Corp* v. *Alabama G. S. R. Co. et al.*, 151 I.C.C. 126; *Through Routes and Joint Rates between Inland Waterways Corp. and Other Common Carriers*, 153 I.C.C. 129, 172 I.C.C. 525, 181 I.C.C. 675, 192 I.C.C. 173; *City of St. Paul* v. *Chicago, B. & Q. R.R. Co.*, 168 I.C.C. 379, 192 I.C.C. 79; *Cotton from South and Southwest*, 183 I.C.C. 33; *Inland Waterways Corp.* v. *Aberdeen & R. R.R. Co.*, 183 I.C.C. 761; *Inland Waterways Corp. Through Routes and Rates*, 192 I.C.C. 663.

could be carried to vague, unreasonable, unlimited, unforeseen lengths.

Moreover, appellant's contention overlooks the declared purpose of Congress to foster and preserve railway transportation as well as water transportation. In the 1920 act Congress enacted many provisions looking to the development and maintenance of an adequate railway service in the public interest. This purpose has been explained in many decisions of this Court. The first was the familiar decision in *Wisconsin R.R. Comm.* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563, in which the Court, referring to Transportation Act, 1920, at page 585, said:

> The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an *adequate railway service* for the people of the United States.

The "other important steps" have been explained many times by this Court in cases so familiar it is only necessary to cite them: *New England Divisions Case*, 261 U.S. 184, 189–190; *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 477–478; *Railroad Comm. of California* v. *Southern Pacific Co.*, 264 U.S. 331; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266, 277; *Colorado* v. *United States*, 271 U.S. 153; *United States* v. *Louisiana*, 290 U.S. 70.

Recently the Congress has enacted legislation "to relieve the existing national emergency in relation to interstate railroad transportation." Emergency Railroad Transportation Act, 1933, approved June 16, 1933, c. 91, 48 Stat. 211. This act was passed, among other reasons, "in order to safeguard and maintain an adequate national system of transportation." The precarious financial condition of the railroads, as fully demonstrated by the facts and figures given in the Commission's report in *Fifteen Per Cent Case, 1931*, 178 I.C.C., 539, was not due entirely to the economic depression, but was due in large part to competition of other transportation agencies, particularly trucks, busses and waterways. See the Commission's discussion in the last-cited case under the heading "The Railroad Future," page 580, et seq. Indeed, it is a matter of common knowledge that trucks and water carriers have made deep inroads into the traffic formerly carried by the railroads, and that many railroads are now struggling for existence.[9]

The conclusion follows that, in order to maintain an adequate national railway service and also to preserve in full vigor both rail and water transportation, the provisions of the various statutes relating to railway and water transportation are to be construed so as to give rail and water carriers equality of opportunity for competitive traffic. No statutory provisions guarantees to appellant that the rates of the railroads with which it competes will be kept high enough to enable appellant to maintain rates lower than the railroad rates and yet high enough to enable it to continue profitably as a water carrier. It seems certain that there is nothing in section 500 of the Transportation Act of 1920, relied upon by appellant, that prevents the railroads from making reductions in their rates, not down to a noncompensatory basis, but to a level well above the cost of furnishing the service, nor that prevents the Commission from permitting such reduced rates, published and filed by the voluntary act of the carriers, when, after full investigation and ascertainment of all the facts, the Commission is unable to find that such proposed rates are unlawful in any respect.[10]

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[9] See Commission's Annual Report to Congress for 1932, pages 1–6 et seq.; Annual Report for 1933, page 1 et seq.; see also Report of the Federal Coördinator of Transportation dated March 10, 1934, dealing, *inter alia*, with the question "Is there need for Federal legislation to regulate other transportation agencies, and to promote the proper coordination of all means of transport?"

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[10] The following is said in respect of "equality of opportunity" in the Commission's report in *Transcontinental Cases of 1922*, 74 I.C.C. 48, 56: "The rail lines contend that the proposed rates are no lower than are necessary to yield them a fair share of the business. A fair share of the business seems to be regarded as such an amount thereof as can be secured under equality of opportunity. Equality of opportunity may be defined as such an adjustment of rates as would cause a business man, under ordinary circumstances, to reach the conclusion after considering service and rates that he would ordinarily be as willing to send traffic by water as by rail, or vice versa.

(b) The contention that the Commission's report admits the order sanctions a violation of section 500, Transportation Act, 1920, is unfounded

Appellant's brief lifts parts of sentences from the Commission's report and urges they constitute an *admission* that the order sanctions a violation of the declaration of policy in section 500. Appellant's brief says, page 60, that "The rates authorized by the Commission are such as will 'dry up the water movement', and 'be a staggering blow to water transportation' and 'take away the net earnings of the Federal Barge Line.'" The first excerpt is taken from the sentence in the Commission's report reading:

> The proposed rates, as applied to the interior points alone, would probably bring respondents a heavy traffic, would stop a large part of the distribution of the water-borne sugar, and dry up much of the water movement. (R. 42–43.)

But these were some of the reasons why the Commission did not approve the proposed rates. The Commission did not find, or suggest, that the substantially higher rates that it did authorize would have that effect. Such result may not be inferred. It must be presumed, too, especially since the evidence introduced in the Commission proceeding has not been put before the Court, that the rates approved by the Commission, in the exercise of its administrative functions, which rates were neither those proposed by the railroads nor the appellant, are lawful rates. Compare *Keogh* v. *C. & N.W. Ry. Co.*, 260 U.S. 156, 160, 161, 162.[11]

The next excerpt appears in the following context:

> Protestant urges that respondents have conspired in restraint of trade and in violation of the antitrust law to monopolize the traffic. If respondents succeed, the barge lines will be dealt a staggering blow. (R. 46.)

Clearly there is nothing to show that respondents have succeeded in monopolizing the traffic under consideration.

The third excerpt is taken from the following language in the Commission's report:

> ~~These standard barge lines get most all the sugar traffic, principally because of their~~ 10-cent differential, which the proposed rates, if the 80-per cent basis is continued, would reduce to 5 cents. If the differential is substantially reduced, the standard barge lines will get less sugar, and lower rates on such of it as they do handle. Barge [such] rates, made on the 80-per cent basis, if applied to the tonnage moved by the Federal

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[11] There, upon the filing of certain rates, they were suspended by the Commission for investigation. After extensive hearings the rates were approved by the Commission. The Court said: "All the rates fixed were reasonable and nondiscriminatory. That was settled by the proceedings before the Commission. *Los Angeles Switching Case*, 234 U.S. 294. * * * The rates complained of have been found by the Commission to be legal."

> Barge Line in 1931, would have cost that carrier about $350,000 and wiped out its showing of net revenue. (R. 46.)

Here again the Commission was talking about the *proposed* rates and not the rates 13 or 14 percent higher which the Commission approved. It is significant, too, that the Federal Barge Line was not a protestant in the Commission proceeding, and that it did not join appellant in this suit.

Appellant's brief further says: "The admitted result which will obtain under the rates approved or authorized by the Commission will be to take sugar tonnage from the water lines and cripple or eliminate water transportation." No admission that the rates approved or authorized by the Commission will cripple or eliminate the water lines is to be found in the Commission's report.

II

Appellant was accorded a full and fair hearing and the Commission's denial of its petition for rehearing was not an abuse of discretion

Appellant does not deny that it was permitted to intervene in the Commission's proceeding, to participate therein as a party protestant against the proposed rates, to submit whatever relevant evidence it desired to offer, to file printed briefs, and to make oral argument before the Commission upon the issues involved. Its contention that it was denied a fair hearing is grounded solely on the Commission's refusal to grant its petition for rehearing alleging changed conditions.

The hearing in this case was held during October and November 1932, and a large volume of testimony, as indicated by the Commission's report, was introduced. The case was submitted March 2, 1933, and decided July 3, 1933, eight months after the date of the hearing. The appellant's petition to the Commission for rehearing, based on alleged changed conditions, was filed 22 days after the date of the Commission's report. Appellant relies solely upon *A., T. & S. F. Ry. Co.* v. *United States*, 284 U.S. 248, holding that the Commission's denial of the petition, filed in February, 1931, for rehearing of the case in which the record before the Commission closed in September, 1928, was not within the permitted range of the Commission's discretion (under section 16a), but was a denial of right. There the Court took judicial notice of the changes in conditions. The depression, it said, "is the outstanding contemporary fact, dominating thought and action throughout the country." Further, the Court said: "It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—can not be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements."

In the case at bar it is clear there were no fundamental changes in conditions during the short period intervening between the close of the hearing in November, 1932, and the date of the Commission's report in July, 1933.

We think, as the court below held, that appellant's contention in this respect "is sufficiently answered by the language of the Supreme Court in *United States* v. *Northern Pacific Ry. Co.*, 288 U.S. 490, 494," in which the Court said:

> The decision in the *Santa Fe* case (284 U.S. 248) is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public.

III

No showing having been made that the Commission's order subjects appellant to legal injury, actual or threatened, appellant is without right to maintain this suit

Appellant is a common carrier engaged in transportation by water from New Orleans to points on the Mississippi and Ohio rivers. As such carrier it competes with the railrads for traffic, and particularly for the sugar traffic under consideration. Although it protested to the Commission against the reduced rates proposed by the railroads, and was a party to the proceedings conducted by the Commission, it is not a respondent to the order issued by the Commission, nor does the order make any requirement of it or in connection with it or its rates. The sole basis for its complaint is that since the Commission by its order declined to prevent the railroads from reducing their rates, and gave its authorization to the establishment of reduced rates, appellant's competitive position will not be as favorable in the future as it has been in the past.

But appellant has no legal right, either by statute or at common law, to carry any particular share of prospective traffic. *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 279 U.S. 768, 780; *Sprunt & Son, Inc.* v. *United States*, 281 U.S. 249. (Compare concurring opinion of Mr. Justice Stone, concurred in by Mr. Justice Brandeis, Mr. Justice Roberts and Mr. Justice Cardoza, in *United States* v. *Illinois Central R.R. Co.*, No. 422, October Term, 1933, decided March 5, 1934.)

This case therefore seems to be within the rule of *Edward Hines Trustees* v. *United States*, *supra*, a suit to enjoin an order of the Commission requiring certain railroads to cease and desist from collecting so-called penalty charges. There, the appellants, engaged as lumber dealers, and having under construction a local railroad in Mississippi, claimed the order infringed their rights both as shippers and as prospective carrier. The Court said (263 U.S., at page 148):

> * * * But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U.S. 88, 111. Plaintiffs' right is limited to protection against unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection. The correctness of those findings cannot be assailed here; among other reasons, because the evidence on which

> they were made is not before the Court. *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U.S. 114.

Similarly, appellants in the case at bar have no absolute right to require their rail competitors to impose higher rates than those found lawful by the Commission.

The case at bar is not like the *Chicago Junction Case,* 264 U.S. 258, for there the order violated legal rights of the complaining carrier under section 5 (2) of the Interstate Commerce Act to equal treatment, this distinction having been pointed out by this Court in *Sprunt & Son* v. *United States,* 281 U.S. 249, 257, note 5. Nor is the case at bar like *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 257, for as likewise stated in note 5 on page 257 of the *Sprunt* case, the right under the last paragraph of section 4 of the act, not to pay increased rates except when due to reasons other than the elimination of water competition, was clearly the right of the shipper. Nor is it like cases such as *Chesapeake & Ohio Ry.* v. *United States,* 283 U.S. 35, and *Claiborne-Annapolis Ferry* v. *United States,* 285 U.S. 382, where the right of a railroad to bring suit to enjoin and set aside a certificate of public convenience and necessity to a competing line is predicated upon a right expressly given in section 1 (20) of the act.

In the *Sprunt* case, at pages 256–257, the Court said:

Appellants' present position resembles in all essentials one which was put forward in *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 147, 148 and *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U.S. 178, 188. There, as here, the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs there, as here, were not subjected to or threatened with any legal wrong. And, since the carriers acquiesced in the order of the Commission, the plaintiffs could not maintain an independent action to annul the order. Appellants' present position is unlike that of the plaintiffs in the cases relied upon. *United States* v. *Village of Hubbard*, 266 U.S. 474; *The Chicago Junction Case*, 264 U.S. 258; *Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42. In each of those cases, an independent legal right of the plaintiff was affected by the order which it was sought to set aside.

In the case at bar appellant "readily concedes that the removal of a competitive advantage, or even the diminution of a competitive quality, to which a party has no legal right, does not give that party any standing in court." (Appellant's brief, P. 84.) It is appellant's position that the Commission's order infringes some legal right granted it by the congressional policy declared in Section 500 of Transportation Act, 1920. The thought seems to be that because Congress declared in that section that its policy is to promote water transportation and to foster and preserve in full vigor both rail and water transportation, the Interstate Commerce Commission is bound to require all railroads competing with water lines to keep their rates so high that their competition with the water lines will be ineffectual, to the end that the water lines will be able to carry a share of the competitive traffic sufficient to enable them to continue in business.

But obviously Section 500 is not to be so construed. Appellant competes not only with the railroads but also with other water lines on the same waterways. The Commission granted it a certificate of public convenience and necessity and fixed its joint water-and-rail rates differentially under the all-rail rates, in pursuance of Section 3 (e) of the Denison Act. No provision in the Interstate Commerce Act or in any other statute gives it the right or puts the duty upon the Commission to keep the rate of the railroads at any particular level. The railroads have the right to compete for this traffic, and obviously the Commission is without authority to prevent the railroads from maintaining competitive rates, provided only that those rates are lawful rates under the Interstate Commerce Act or other applicable statute.

The assertion that the order sanctions a violation of the anti-trust laws is patently unsound. Appellants, who with other water lines now enjoy practically a monopoly in the sugar traffic under consideration, charged before the Interstate Commerce Commission that the railroads have conspired to monopolize this sugar traffic, as shown by the following excerpt from the Commission's report: "Protestant urges that respondents have conspired in restraint of trade and in violation of the anti-trust law to monopolize the traffic. If respondents succeed, the barge lines will be dealt a staggering blow." (R. 46.)

But, as stated in the Commission's order of July 3, 1933, the Commission suspended the operation of the railroads' schedules so far as they proposed changes in the rates on sugar and "entered upon hearings concerning the lawfulness of the rates, charges, regulations and practices stated in the schedules.", (R. 64.) This is strictly in accordance with the language of Section 15 (7) of the Act authorizing the Commission to "enter upon a hearing concerning the lawfulness" of any suspended new rate, etc. The Commission found that the most important rates proposed by the carriers were too low and gave its approval only to rates which were substantially higher. It seems undeniable that the rates which the Commission itself proposed, namely, rates 13 to 14 percent higher than those proposed by the carriers, were regarded by it as lawful rates under the Interstate Commerce Act and other acts which the Commission administers. Hence, even if it be admitted, for the sake of discussion, that the carriers intended to make rates so low as to drive out water competition, their intention was frustrated by the action of the Commission in refusing to approve rates as low as they proposed. And this restraining influence will continue in the future, any further proposed reduced rates by the railroads likewise being subject to suspension, and investigation by the Commission concerning their lawfulness. Therefore, the charge of alleged conspiracy to monopolize the sugar traffic, by means of rates low enough to drive the water lines out of business, disappears. Compare *Keogh* v. *C. & N.W. Ry. Co.*, 260 U.S. 156. The mere allegation in a bill under the Urgent Deficiencies Act to enjoin and set aside an order of the Commission, within the exclusive jurisdiction of a specially-constituted district court, having only the limited jurisdiction conferred upon it by the statute, not including the authority to determine an alleged violation of the antitrust laws, would not give the petitioner a standing to maintain the suit.

Nor do the unsupported allegations that the order authorizes rates that violate the undue prejudice clause of section 3 or the long-and-short haul clause of section 4 of the Interstate Commerce Act give the appellant standing. There was no finding by the Commission that the rates it approved would bring about such violations. Those allegations, if true, do not affect appellant. The court "will not listen to a party who complains of a grievance which is not his." *Interstate Commerce Commission* v. *Chi., R. I. & Pac. Ry.*, 218 U.S. 88, 109. The alleged violation of section 3 is that the reduced rates apply to points such as Paris, Ill., and Des Moines, Iowa, whereas the former rates will continue to apply to nearby points such as Terre Haute, Ind., and Davenport, Iowa. (See report, R. 47, 48.) But as the Commission said, these contentions were not supported by any evidence of injury and no one appeared who might be adversely affected. (R. 47, 48.) These are not appellant's grievances. But even if they were, that is to say, even if they were matters which affected appellant and of which appellant would be entitled to complain, they would not give appellant standing to maintain this suit. In order to maintain the suit appellant must show that the order deprives it of a definite legal right, as in the *Chicago Junction* case and others like it, as distinguished from a right the determination of which is within the administrative judgment of the Commission, such as whether a rate is unreasonable, unduly prejudicial or unjustly discriminatory, in violation of sections 1, 2, 3 and 4 of the Act. *Sprunt* case, *supra,* page 255; *United States* v. *Merchants & Mfrs. Asso.,* 242 U.S. 178, 188; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426; *Great Northern Ry. Co.* v. *Merchants Elev. Co.,* 259 U.S. 285, 295; *Nashville Ry.* v. *Tennessee,* 262 U.S. 318, 322; *Pennsylvania Co.* v. *United States,* 236 U.S. 351, 361; *Davis* v. *Portland Seed Co.,* 264 U.S. 403.

CONCLUSION

It is respectfully submitted that the decree of the court below denying the prayer of and dismissing the bill should be affirmed.

J. Crawford Biggs,
Solicitor General,
Elmer B. Collins,
Special Assistant to the Attorney General,
J. Stanley Payne,
Assistant Chief Counsel,
Interstate Commerce Comission.

Harold M. Stephens,
Assistant Attorney General,
Daniel W. Knowlton,
Chief Counsel,
Interstate Commerce Commission,
Of Counsel.

March 1934.

APPENDIX

The Interstate Commerce Act (U.S.C. Tit. 49) provides:

SECTION 1:

(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

* * * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *

SECTION 5:

(19) From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight

or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

(20) Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

(21) If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may con-

tinue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided,* Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

SECTION 6:

(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided,* That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

SECTION 15:

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or

minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto) and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The

Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided,* That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as

in its opinion are necessary or desirable in the public interest.

* * * * *

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case,

of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 16a:

That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obey-

> ing any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

Section 201, Transportation Act, 1920, c. 91, 41 Stat. 458 (U.S.C.Tit. 49, Sec. 141) provides:

> (a) On the termination of Federal control, as provided in section 200, all boats, barges, tugs, and other transportation facilities, on the inland, canal; and coastwise waterways (hereinafter in this section called "transportation facilities") acquired by the United States in pursuance of the fourth paragraph of section 6 of the Federal Control Act (except the transportation facilities constituting parts of railroads or transportation systems over which Federal control was assumed) are transferred to the Secretary of War, who shall operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during Federal control shall be continued, and

assume and carry out all contracts and agreements in relation thereto entered into by or through the President in pursuance of such paragraph prior to the time above fixed for such transfer. All payments under the terms of such contracts, and for claims arising out of the operation of such transportation facilities by or through the President prior to the termination of Federal control, shall be made out of moneys available under the provisions of this Act for adjusting, settling, liquidating, and winding up matters arising out of or incident to Federal control. Moneys required for such payments shall, from time to time, be transferred to the Secretary of War as required for payment under the terms of such contracts.

(b) All other payments after such transfer in connection with the construction, utilization, and operation of any such transportation facilities, whether completed or under construction, shall be made by the Secretary of War out of funds now or hereafter made available for that purpose.

(c) [*As amended March 4, 1921.*] The Secretary of War is hereby authorized, out of any moneys hereafter made available therefor, to construct or contract for the construction of terminal facilities for the interchange of traffic between the transportation facilities operated by him under this section and other carriers whether by rail or water, and to make loans for such purposes under such terms and conditions as he may determine to any State, municipality, or transportation company; or to expend such moneys for necessary terminal improvements and facilities upon property leased from States, cities, or transportation companies under terms approved by the Interstate Commerce Commission, or otherwise, in accordance with any order rendered by said Commission under subheading (a), paragraph 13, section 6, Interstate Commerce Act.

(d) Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above Saint Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above Saint Louis.

(e) The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the "Shipping Act, 1916," as now or hereafter amended, in the same manner and to the same extent as if such transportation facilities were privately owned and operated; and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein. For the performance of the duties imposed by this section the Secretary of War is authorized to appoint or employ such number of experts, clerks, and other employees as may be necessary for service in the District of Columbia or elsewhere, and as may be provided for by Congress.

Section 500, Transportation Act, 1920, c. 91, Title 5, 41 Stat. 499 (U.S.C. Tit. 49, Sec. 142) provides:

> It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.
>
> It shall be the duty of the Secretary of War, with the object of promoting, encouraging, and developing inland waterway transportation facilities in connection with the commerce of the United States, to investigate the appropriate types of boats suitable for different classes of such waterways; to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, and also railroad spurs and switches connecting with such terminals, with a view to devising the types most appropriate for different locations, and for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities, cities, and towns regarding the appropriate location of such terminals, and to cooperate with them in the preparation of plans for suitable terminal facilities; to investigate the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and whether the water carriers utilizing such waterways are

interchanging traffic with the railroads; and to investigate any other matter that may tend to promote and encourage inland water transportation. It shall also be the province and duty of the Secretary of War to compile, publish, and distribute, from time to time, such useful statistics, data, and information concerning transportation on inland waterways as he may deem to be of value to the commercial interests of the country.

The words "inland waterway" as used in this section shall be construed to include the Great Lakes.

The Inland Waterways Corporation Act, c. 243, 43 Stat. 360, approved June 3, 1924 (U.S.C.Tit. 49, Secs. 151–156) provides:

> That for the purpose of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the Government, of carrying out the mandates of Congress prescribed in section 201 of the Transportation Act, 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of section 500 of such Act, there is hereby created a corporation, in the District of Columbia, to be known as the Inland Waterways Corporation (hereinafter referred to as the "corporation"). The Secretary of War shall be deemed to be the incorporator, and the incorporation shall be held effected upon the enactment of this Act. The Secretary of War shall govern and direct the corporation in the exercise of the functions vested in it by this Act.

* * * * *

SECTION 3:

(a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War, under section 201 of the Transportation Act, 1920, as amended, and shall, as soon as there is an improved channel sufficient to permit the same, initiate the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

(b) If the Secretary of War deems it advisable to discontinue the operation of any part of the transportation or terminal facilities, or to develop and operate new lines, in order to give the public the proper service, he shall report thereon to Congress. The operation of any of such facilities shall not be discontinued and new lines shall not be developed or operated until authorized by Congress.

(c) The operation of the transportation and terminal facilities under this Act shall be subject to the provisions of the Interstate Commerce Act, as amended, and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were privately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels.

The Denison Act, c. 891, 45 Stat. 978, approved May 29, 1928 (Supp. VI, U.S.C. Tit. 49, Sec. 152–154) provides:

That section 2 of the Act entitled "An Act to create the Inland Waterways Corporation for the purpose of carrying out the mandate and purpose of Congress, as expressed in sections 201 and 500 of the Transportation Act, and for other purposes", approved June 3, 1924 (paragraph 152, chapter 5, title 49, Code of Laws of the United States; chapter 243, volume 43, page 360, United States Statutes at Large), be, and the same is hereby, amended to read as follows:

* * * * *

"SEC. 3. (a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War under section 201 of the Transportation Act, 1920, as amended, and shall continue to operate the facilities now being operated or that may hereafter be operated by it under the provisions of this Act; and shall, as soon as there is an improved channel sufficient to permit the same, initiate and continue the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

* * * * *

"(c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engage, or are ready and willing to engage, in common-carrier service on such rivers.

* * * * *

"(e) Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commisison, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: *Provided,* That if the Inland Waterways Corporation sells or leases its transportation facilities to any person, firm, or corporation to be operated as a common carrier, such person, firm, or corporation shall be entitled to a certificate of public convenience and necessity upon making application therefor; and all through traffic arrangements and joint tariffs with rules, regulations, and practices in connection therewith published by the Inland Waterways Corporation and filed with the Interstate Commerce Commission and participated in by other carriers shall remain in full force and effect between such carriers and the person, firm, or corporation purchasing or leasing such transportation facilities from the Inland Waterways Corporation and operating the same as common carriers until changed by order of the commission, except that such through-traffic arrangements and joint tariffs, with rules, regulations, and practices therewith, may be changed by mutual consent of the water carrier and the other participating carriers. Joint rail and water rates as herein used shall be deemed to include every movement of traffic in which a water line can participate.

"(f) The operation of the transportation and terminal facilities under this Act shall be subject to the provisions of the Interstate Commerce Act, as amended, and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were privately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels."

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MISSISSIPPI VALLEY BARGE LINE COMPANY,
Appellant,

vs.

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WILLIAM A. NORTHCUTT,
HORACE L. WALKER,
ELMER A. SMITH,
Attorneys for Interveners.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Defendants.

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BRIEF FOR INTERVENERS, ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, AND NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

STATEMENT.

This is a suit brought by the Mississippi Valley Barge Line Company against the United States of America and the Interstate Commerce Commission, under the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. Sec. 47, as amended by the Act of February 13, 1925, 28 U. S. C. Sec. 345, to set aside, annul and enjoin the enforcement of an amended order of the Interstate Commerce Commission in a proceeding arising under Paragraph (7) of Section 15 of the Interstate Commerce Act (49 U. S. C. Sec. 15 (7)), known as *Investigation & Suspension Docket No. 3814, Sugar from Gulf and South Atlantic*

Points. Paragraph (7) of Section 15, the material portion of which is found in the appendix of this brief, authorizes the Commission to enter upon a hearing concerning the lawfulness of new rates proposed by carriers, and pending such hearing and the decision thereon, to suspend the operation of the schedule naming the proposed rates, but not for a longer period than seven months beyond the time when the schedule would otherwise go into effect.

By tariff schedules filed to become effective on October 1, 1932 and later dates the railroads (among which were these interveners) serving the sugar refineries in New Orleans, Louisiana, and Savannah, Georgia, proposed to reduce their rates on sugar from New Orleans and Savannah to Chicago, Illinois, St. Louis, Missouri, points in Illinois, points on the west bank of the Mississippi River in Iowa and Missouri, points in southern Wisconsin, and points in the territory intermediate thereto, principally in western and southern Indiana and most of Kentucky and Tennessee (R. 35-36). Upon protest of appellant and others the Commission, acting upon the authority vested in it by Section 15 (7) of the Interstate Commerce Act, suspended the operation of the schedules naming these reduced rates on sugar until May 1, 1933 (R. 36).

The sugar refineries at New Orleans, while located on and served by the railroads, are also located on the Mississippi River and can and do ship sugar from the refineries by water to ports on the Ohio and Mississippi Rivers. Sugar is shipped from Savannah by ocean and gulf to New Orleans, and thence by barges on the Mississippi River to northern ports. But the greater part of the sugar tonnage here involved originates at New Orleans (R. 36) and the rates which really concern appellant are those from New Orleans. (pp. 4 and 5 of appellant's brief.)

Until a few years ago the railroads serving these sugar refineries in New Orleans enjoyed long hauls from the origin points on practically all the sugar traffic, but now they generally receive only the hauls beyond the river-landing destinations on that part of the traffic which is not distributed therefrom by truck (R. 37).

The all-rail movement of sugar from Louisiana is now confined almost entirely to occasional, special, or emergency shipments (R. 37). The railroads serving the Louisiana refineries are hauling practically no sugar from those refineries to destinations in the territory just described. Nearly all of the Louisiana production sold in this destination territory and in contiguous territory moves by barge from these sugar refineries in New Orleans as far as St. Louis, Cairo, Peoria, Evansville, Louisville, Cincinnati and Memphis, whence it is distributed to the interior by motor trucks (R. 36).

The losses in the sugar tonnage that have been sustained by the railroads in recent years are enormous. The Commission found (R. 37) that the diversion of the sugar traffic to the barge lines in 1932 cost the Illinois Central Railroad Company, the principal carrier in this case, probably half a million dollars in revenue. This loss was due to the fact that the Illinois Central Railroad generally received on the traffic only the revenue for the hauls beyond the river-landing destinations, based on its division of the joint rates with the barge line, whereas previously it received the through charges for the long hauls from the sugar refineries to the final destinations (R. 37).

In 1932 the barge movement of sugar from Louisiana amounted to over 500,000 tons, about ten times as much as moved all-rail from the Louisiana refineries to the same territory. Four thousand tons moved from Savannah by water to Evansville, Indiana, and Louisville, Kentucky, the sugar being transported by ocean and gulf to New Orleans and thence by river (R. 36).

By far the greater part of the water-borne traffic in sugar was carried by the Federal Barge Line, operated by the Government-owned Inland Waterways Corporation on local rates or joint rates with the delivering rail carriers. A small proportion was similarly taken by the Mississippi Valley Barge Line Company, the appellant in this proceeding, and some by the American Barge Line Company (R. 36). These three carriers, commonly known as the "standard" barge lines, operated in connection with the rail lines under certificates of public convenience and necessity issued by the Commission under Section 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360, as amended by c. 891, Sec. 2, 45 Stat. 978 (49 U. S. C. Sec. 153 (e)). This section was recently before the Court in *United States* v. *Illinois Central R. R. Co., et al.*, No. 422, October Term, 1933, decided March 5, 1934.

Under Section 3 (e) of the Inland Waterways Corporation Act, as amended, any person about to engage in conducting a common-carrier service upon certain designated waters may, upon application to the Commission, obtain a certificate of public convenience and necessity in accordance with Section 1 of the Interstate Commerce Act, and the Commission shall thereupon by order direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates and shall in such order "fix reasonable minimum differentials between the all-rail rates and joint rates in connection with said water service."

The Commission in cases which we shall later cite has entered orders requiring the rail carriers to join with these barge lines in the establishment of through routes and joint rates on numerous commodities, including sugar, and has fixed reasonable minimum differentials between the all-rail rates of the rail carriers and the joint barge and rail rates.

Barge-rail rates on sugar from New Orleans to points in the North, under these orders of the Commission, have usually been constructed by deducting from the through all-rail rate from New Orleans to the destination point an amount equivalent to 20 per cent of the all-rail rate on sugar from New Orleans to the river port reached by the barge line (R. 39). A reduction in the all-rail rate from New Orleans to the river port carried along with it a reduction in the difference between the all-rail and the rail-barge rates, which difference is usually called the barge line differential. For example, the all-rail rate on sugar from New Orleans to St. Louis which was in effect prior to the time the rates were reduced, was 50 cents. Twenty per cent of this all-rail rate of 50 cents is 10 cents, and the barge-rail rate that was formerly in effect from Chicago to Peoria, for example, was arrived at by deducting 10 cents from the all-rail rate on sugar from New Orleans to Peoria of 54 cents, making a barge-rail rate of 44 cents (R. 38, 39). These rates are exclusive of the emergency charges which were required by the Commission to be discontinued after March 31, 1933 (*The Fifteen Per Cent Case, 1931,* 178 I. C. C. 539, 179 I. C. C. 215, 191 I. C. C. 361. See *United States* v. *Louisiana,* 54 Sup. Ct. Rep. 28).

The American Barge Line, one of the so-called standard barge lines, much of whose business is merely towage service, does not have a complete system of joint rates on sugar in connection with the rail lines, but has some arrangements of a similar nature with truck lines (R. 36). The appellant, the Mississippi Valley Barge Line Company and the American Barge Line took some sugar from New Orleans at lower rates than were charged by the Federal Barge Line. They do not adhere absolutely to this usual differential basis on all traffic. Tramp or contract barge operators obtained considerable tonnage at still lower figures (R. 36, 37).

The practice of shipping sugar in contract barges from New Orleans developed rapidly in 1932 (R. 43). At least two of the largest refineries resorted to it as a means of meeting the flood of sugar moving by water from the East and California. One refiner financed barge operations and was thus in a position to dictate the rates to be charged. This refiner seems to have had no doubt about his ability to obtain a sufficient supply of contract water craft in the future (R. 44). The railroads were apprehensive about the situation and were convinced that it required quick action (R. 44). They feared that if the tendency on the part of the sugar refiners to use contract barges was not stopped, all the refiners, to protect themselves, would use contract barges or provide their own barges for most of the traffic. Petroleum, steel and cotton interests had already entered the river transportation business to a greater or less extent (R. 44). The Commission has recently had occasion to consider the great handicaps under which the railroads labor in meeting the competition of petroleum refiners who ship petroleum in their own barges from refining points in the New Orleans-Baton Rouge district to ports on the Mississippi and Ohio Rivers (*Petroleum from New Orleans Group to Memphis*, 194 I. C. C. 31). The Commission in a recent report dealing with cotton rates (*Rate Structure Investigation, Part 3, Cotton,* 181 I. C. C. 474) modified the orders it had theretofore entered in that proceeding so as to enable the carriers to reduce their rates on cotton to New Orleans where such action was necessary to meet the competition of trucks or barges or both.

One of the main purposes of the reductions in sugar rates proposed by these interveners and other carriers serving the refineries in New Orleans was to discourage the refineries themselves in providing their own means of transportation or patronizing operators of contract barges. The mere publication of the proposed rates had deterred one refinery from increasing its river terminal facilities (R. 44).

The tramp or contract barges transport traffic only in a port-to-port service and do not enter into through routes and joint rates with the rail carriers. These tramp and contract barges, are therefore subject to no regulation whatever with respect to their rates. The so-called standard barge lines that join in through routes and joint rates with the rail carriers are subject to the Interstate Commerce Act in so far as these joint rates are concerned. But their port-to-port rates are not subject to the jurisdiction of the Commission, and the port-to-port rates of both the standard barges and the contract barges may be changed at will and without previous notice, and out of these port-to-port rates the barge lines may pay rebates, give allowances, and allow special privileges (R. 25).

With these enormous losses in the sugar traffic before them, with the ever-increasing losses to both the standard barge lines and the contract barge lines, with the rapidly developing practice of the refiners in shipping sugar in contract barges, and with their experience with contract barges in the petroleum, steel, and cotton industries, the rail carriers were confronted with the question as to what action they should take in order to prevent any further losses in their sugar traffic and to regain some part at least of the traffic that they had lost in the last few years.

The rates on sugar from New Orleans, as well as other sugar refineries in the United States represented a compromise on the part of the principal shippers and rail carriers following the Commission's decision in the *Sugar Cases of 1922*, 81 I. C. C. 448, which had stood without substantial modification for about 10 years (R. 21). But there could be no doubt that their rates were on too high a level to meet the competition of the new and powerful competitive agencies of transportation in the form of water and truck carriers that maintained much lower rates than the rates of the rail carriers (R. 21).

The rail carriers could not complain of the level of the port-to-port rates of the water carriers, or of the rates of the truck carriers, for their rates are subject to no regulations and could be changed at will.

There was no regulatory body that had the power to fix minimum rates for the port-to-port service of the water carriers or for the service of the truck carriers. The report of March 10, 1934, of the Federal Coordinator of Transportation respecting the regulation of water and motor carriers portrays the demoralization that characterizes the operations of the motor and water carriers today and the cut-throat competition in which they engage as a result of the absence of any control over their rates.

The differentials between the all-rail rates and the barge-rail rates were much too wide from a competitive-service standpoint, for the standard barge lines were taking the most of the traffic (R. 45). The only possible way, therefore, of reducing the differential and thus narrowing, the spread between the all-rail rates and the barge-rail rates, was to reduce the rail rates themselves, and this the carriers serving the refineries at New Orleans proposed to do.

The carriers serving the refineries in New Orleans proposed two separate bases of rates, one subject to an 80,000 pound minimum per car, and the other, on a somewhat higher level, subject to a 60,000 pound minimum per car (R. 37). Protests against the proposed rates were, as stated, filed with the Commission by the appellant and other parties, and the schedules naming the proposed rates were suspended by the Commission (R. 36). A hearing was held before the Commission on October 25-November 3, 1933, at which the appellant and other protestants appeared and offered testimony in opposition to the proposed rates. The Commission handed down its decision on July 3, 1933. It found that the carriers had amply justified the rates proposed by them from New Orleans based upon a minimum weight of 60,000 pounds per car (R. 49). The Commission found, however, that the proposed rates based upon a minimum weight of 80,000 pounds per car were somewhat lower than the necessities of the situation required, but further found that the carriers had justified rates 4 cents higher (R. 50).

What may be said to be the key rates in the adjustment of sugar rates from New Orleans are those to Chicago and St. Louis, and we set forth below a statement which shows the rates on sugar from New Orleans to Chicago and St. Louis that were formerly in effect, the rates based upon a minimum weight of 80,000 pounds per car, proposed by the rail carriers, the rates suggested before the Commission by appellant, and the rates which the Commission found justified. The rates which really concern appellant and of which it complains are those based upon a minimum weight of 80,000 pounds per car.

From	To	Former Rates (Cents)	Rates Proposed by Rail Carriers (Cents)	Rates Proposed by the Appellant (Cents)	Rates Found Justified by the Commission (Cents)
New Orleans	Chicago	56	30	40	34
New Orleans	St. Louis	52	28	38	32

Appellant set out in its brief (p. 5) a similar statement but omitted the reduced rates actually suggested by it before the Commission.

The Commission entered an amended order on July 18, 1933 (R. 67) in which it vacated its order of suspension theretofore entered, so far as it related to rates based upon a minimum weight of 60,000 pounds, but further ordered the carriers to cancel such of their schedules as named rates based upon a minimum weight of 80,000 pounds. The order of the Commission did not require the establishment or maintenance by the railroads, including these interveners, of any rates whatsoever.

Appellant on or about July 25, 1933, filed with the Commission a motion for rehearing (R. 143) which motion was denied by the Commission on August 3, 1933 (R. 143). The appellant then brought suit in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri to set aside and annul the order of the Commission in this proceeding. The Illinois Central Railroad Company, the Louisville & Nashville Railroad Company, the Southern Railway Company, the Cincinnati, New Orleans & Texas Pacific

Railway Company, the Alabama Great Southern Railroad Company and the New Orleans-Northeastern Railroad Company intervened in that proceeding in accordance with the provisions of Section 212 of the Judicial Code (28 U. S. C., Sec. 45a), each one of these railroads having been a party in interest to the proceeding before the Commission (R. 81).

The United States District Court in a memorandum opinion of October 13, 1933, *Mississippi Barge Line Co. v. United States et al.* (Illinois Central Railroad Company *et al.*, Interveners), 4 Fed. Supp. 745 (R. 93), reached the conclusion that the defendants and interveners were entitled to a decree dismissing the bill of complaint, and such a decree was entered on November 21, 1933 (R. 107). It was from that decree that the appellant appealed direct to this court.

The Commission considered at the time it considered the case now before this court, I. & S. Docket No. 3814, *Sugar from Gulf and South Atlantic Points,* four other cases dealing with the rates on sugar: I. & S. Docket No. 3829, *Sugar from Eastern Points to Central Territory*; I. & S. Docket No. 3837, *Sugar from New Orleans to Arkansas Missouri and Oklahoma;* Fourth Section Application No. 14080, *Transcontinental Eastbound Sugar,* and Fourth Section Application No. 14816, *Reduced Rates on Sugar from Colorado, Nebraska, Wyoming and Other States to Illinois Territory.*

The Commission dealt separately in its decision with each of these five cases. The case now before this court, however, involves only the decision and order of the Commission in I. & S. Docket No. 3814, *Sugar from Gulf and South Atlantic Points.*

The Commission in referring to these five cases made this statement in the very first paragraph of its decision (R. 21):

> "These five cases represent collectively a contest among railroad, water, and motor-truck carriers for that great volume of carload sugar traffic which moves from Atlantic and Pacific coast and Louisiana cane-sugar refining points and from interior beet-sugar manufacturing points to central territory and certain middle western points, and particularly to Chicago, Ill., the country's largest market. They, of course, involve indirectly business strife among sugar interests having plants at competing origin points. In the main they embrace the same traffic as *Sugar Cases of 1922,* 81 I. C. C. 448, out of which came a general readjustment of the all-rail sugar rates, representing a compromise on the part of the principal shippers and rail carriers, which has stood without substantial modification for about 10 years. However, conditions have now materially changed. Into the transportation field have lately come new and powerful competitive forces in the form of water and truck carriers that maintain much lower rates than the rail carriers. They have made serious inroads on the traffic of the latter carriers and are threatening soon to take still more of it. To cope with the situation the respective sets of rail carriers serving the origin groups mentioned are here seeking, independently of each other, drastic, sweeping, and quick reductions in rates. They are doing so with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent."

SUMMARY OF ARGUMENT.

I.

Appellant neither makes nor receives shipments of sugar. It pays no freight charges thereon. The rates dealt with by the Commission in its decision were not appellant's rates but the all-rail rates of the rail carriers. Neither the findings nor the order of the Commission required any action on the part of appellant. Appellant filed a protest against the proposed reductions in the rates and offered testimony in opposition thereto at the hearing before the Commission, but this did not entitle appellant to institute an independent suit to set aside the Commission's order in the absence of threatened or actual legal injury. Appellant may have sustained a competitive disadvantage as a result of the establishment by the rail carriers of the reduced rates which the Commission found would not be unlawful, but this did not invade any legal right of the appellant, or cause it to suffer any legal injury. Appellant had therefore no legal right to maintain an independent suit to set aside an order not directed at it and requiring no action on its part (*Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479, p. 486; *Moffat Tunnel League* v. *United States,* 289 U. S. 113; *Sprunt & Son* v. *United States,* 281 U. S. 249).

II.

These intervening rail carriers are not seeking in this proceeding or in any other to set aside the order of the Commission in this case (R. 67), an order that does not require the carriers to establish or change any rates whatsoever. The carriers, had they chosen to do so, could have continued in effect the previously existing rates on sugar from New Orleans to points in the North. Exercising the choice which they had, they made effective reduced rates which were no lower than the reasonable minimum rates which the Commission found had been justified. The rates now in effect, therefore, were published by the carriers as a result of their voluntary action and may be changed only after a hearing. A judgment in appellant's favor under these circumstances would be futile, for it would not restore appellant to the advantage it previously enjoyed. The case presented by appellant to this Court has become moot (*Sprunt & Son* v. *United States*, 281 U. S. 249, p. 257; *United States* v. *Anchor Coal Co.* 279 U. S. 812). Appellant is relegated to such rights as it has under Section 13 (1) and Section 15 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 13 (1) and Sec. 15 (1)), to file a complaint attacking the existing voluntarily established rates of the rail carriers.

III.

The Commission's order in this case did not require the carriers to establish any rates or to maintain them for any specific length of time. The order of the Commission merely carried out certain findings of the Commission with respect to the proposed rates, which findings were to the effect that certain rates would not be unlawful. Thus the findings and order of the Commission are negative in substance and may not under well established principles be judicially reviewed in any court. (*Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Manufacturers' Ry. Co.* v. *United States*, 246 U. S. 457; *Lehigh Valley R. R. Co.* v. *United States*, 223 U. S.

412.) Mere findings by the Commission in its decision that the carriers had justified certain rates may not be reviewed by any court, and for the Court to take jurisdiction of this case would, to use the language in *Alton Railroad Co.* v. *United States*, 287 U. S. 229 (p. 238), be tantamount to the usurpation by the Court of the Commission's functions. What appellant asks this Court to do is to fix reasonable minimum rates that are higher than the reasonable minimum rates fixed by the Commission.

IV.

Rail carriers have the power under the Interstate Commerce Act as it now reads, which they originally possessed, to initiate rates, that is, to fix rates, or to increase or reduce them, to adopt such a policy of rate-making as to them seems wise, to fix their rates to meet the competition of other carriers, provided only that such rates are not in violation of the Interstate Commerce Act (*Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, p. 564; *United States* v. *Ill. Cent. R. R. Co.,* 263 U. S. 515, 521; *Texas & Pacific R. R. Co.* v. *United States,* 289 U. S. 627, p. 636). The Commission itself holds that carriers may properly make rates to meet competitive conditions so long as the rates are not unduly low, do not burden other traffic, and do not give rise to unjust discrimination, undue preference or prejudice, that is to say, do not violate some provision of the Act (*Cottonseed Products to Port Arthur,* 38 I. C. C. 378; *Vinegar Rates from Pacific Coast,* 81 I. C. C. 666; *Galveston Commercial Assn.* v. *G. H. & S. A. Ry. Co.,* 128 I. C. C. 349; *Iron and Steel Articles from the South,* 176 I. C. C. 345).

The duty of determining the question of how far rail carriers may go in reducing rates and whether reduced rates proposed by them are unlawful in any respect has been entrusted by Congress to the Interstate Commerce Commission, and the Commission considered in this case whether the rates proposed by the rail carriers would violate some provision of the Interstate Commerce Act. It found that certain of the rates proposed by the carriers were lower than the necessities of the situation required, but that the carriers had justified rates 4c higher (R. 49).

V.

The Commission reached the conclusion (R. 49) that there could be no reasonable doubt that the proposed rates were high enough to pay more than the cost of the service, and in support of this conclusion the Commission set out (R. 49) numerous findings of fact based upon the evidence before it. The evidence before the Commission is not a part of the record before this Court and the Court must therefore accept the findings of the Commission as conclusive (*Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 262 U. S. 318, p. 324; *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114, p. 116; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, p. 125).

The Commission did not find that the proposed rates were merely sufficient to pay the out-of-pocket cost, but found that they were high enough to pay more than the cost of the service, that is to say, the full cost attributable to the traffic. The Commission found furthermore that the traffic considered would be principally added tonnage that could probably be carried at far lower costs (R. 49).

The Commission found that the carriers had not justified the proposed rates so far as those rates were based upon a minimum weight of 80,000 pounds, but had justified rates 4c higher, the effect of which was to increase the earnings under the rates that the Commission had found justified. Thus the rates which the carriers actually published are indubitably high enough to pay far more than the cost of the service, and are compensatory.

Appellant proceeds on the theory that it may try out *de novo* before this Court, but without the record upon which the Commission acted, the question whether the rates found justified by the Commission are reasonable and compensatory. The facts referred to by the ~~Commission~~ appellan, some of which are in the record before this Court and many of which are not, might well be submitted to the Commission for its consideration, and many of them were. It is established, however, that this Court will not consider the expediency or wisdom of the Commission's order or whether on like testimony it would have made a similar rule, that to consider the weight of the evidence is beyond the province of the Court.

The question whether the proposed rates would be reasonable and compensatory was one to be determined by the Commission, upon evidence and after a hearing. It was so determined and may not under the circumstances here present now be questioned.

VI.

The Commission's findings and order do not sanction a violation of Section 500 of the Transportation Act of 1920, which section declares it to be the policy of Congress to promote, encourage and develop water transportation and to foster and preserve in full vigor both rail and water transportation. Section 500 is merely a declaration of policy on the part of Congress. It lays down no standard by which the Commission may determine the lawfulness of freight rates. What rates are legal is determined by the Interstate Commerce Act (*Keogh* v. *Chicago & North Western Ry. Co.*, 260 U. S. 156 (p. 162)). Section 500 of the Transportation Act does not purport to make any change in the existing law, to make unlawful any rate that is lawful under the existing law, but on the contrary leaves the validity of the rate to be tested by that law, that is, the Interstate Commerce Act (*Ann Arbor R. R. Co.* v. *United States*, 281 U. S. 658).

Even if it be conceded that the Commission is required to apply and give effect to the declaration of policy contained in Section 500, the Commission's decision shows that in passing upon the issues before it the Commission had in mind this declaration of policy and construed and applied the Interstate Commerce Act in the light of that declaration, that what it sought to do, to use its language in a recent case (*Ex-River Coal from Colona, Pa., to Youngstown, Ohio*, 197 I. C. C. 617, p. 633) was to carry out as the agent of Congress the policy expressed in Section 500 consistent with existing law.

Appellant itself conceded at the hearing before the Commission that the all-rail rates from New Orleans were too high and it proposed substantial reductions in those rates. The carriers all likewise proposed substantial reductions in those rates, and the question before the Commission was whether the rates proposed by appellant or by the rail carriers should be fixed as reasonable minimum rates. The Commission in passing upon this question gave consideration, as the decision shows, to the cost of transportation by water, the incidental charges connected with such transportation, how much more rail service is worth in actual practice than water service, the effect of the then-existing rates upon the division of the sugar tonnage between the rail lines on the one hand and the barge lines on the other, and sought to fix a reasonable minimum rate for the rail carriers that would result in a just and reasonable relationship between the rail rates and the rates of the barge lines, that would moreover reflect the superior service inherent in rail transportation, and that would at the same time give the all-rail routes an equality of opportunity with the water routes.

The question of what would be reasonable minimum rates is under the Interstate Commerce Act one of the matters left by Congress to the administrative "tribunal appointed by law and informed by experience" (*Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 205 U. S. 441, p.454). This issue was decided by the Commission in this case following a full and fair hearing at which appellant appeared and offered testimony in support of its contentions,

VII.

The Commission's decision does not sanction a violation of the Anti-Trust Laws. The Commission made no finding in its decision that the carriers proposing the reduced rates had violated the Anti-Trust Laws. The Commission had not the power, and had no occasion to consider that question. This was not the issue before the Commission. The lawfulness of freight rates is determined not by the Anti-Trust Act, but by the Interstate Commerce Act (*Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, 162). Only the United States can sue to enjoin, for an alleged violation of the Anti-Trust Laws, a combination of common carriers subject to the provisions of the Interstate Commerce Act, with respect to a matter within the jurisdiction of the Interstate Commerce Commission (15 U. S. C. Sec. 26, *Central Transfer Co.* v. *Terminal R. R.*, 288 U. S. 469).

VIII.

The Commission's decision does not sanction a violation of Section 3 (1) of the Interstate Commerce Act (49 U. S. C., Sec. 3 (1)). The Commission's decision shows (R. 47, 48, 49) that the Commission in passing upon the issues before it considered whether the rates proposed by the rail carriers would violate Section 3, but found that they would not. Every rate which gives a preference to certain persons, commodities, localities or traffic is discriminatory, but such discrimination is not necessarily unlawful. Section 3 prohibits only that discrimination which is unreasonable, undue, or unjust, and whether a preference or discrimination is undue, unreasonable or unjust is one of the questions of fact that has been confided by Congress to the judgment of the Commission (*N. C. & St. L. Ry. Co.* v. *Tennessee*, 262 U. S. 318, 322.)

Appellant does not contend that the reduced rates on sugar that have been published by the rail carriers from New Orleans to points in the North are unjustly discriminatory against it, or are unduly prejudicial to it. Appellant can make no such claim, for it does not ship or receive sugar and pays no freight charges on shipments of sugar. Its contention is hardly more than a suggestion that shippers, refiners and purchasers of sugar who are not before this court and who did not complain before the Commission, may file a complaint alleging a violation of Section 3. The court will not listen to a party who complains of a grievance that is not his (*Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88).

IX.

The Commission's decision does not sanction a violation of Section 4 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 4 (1)). The Commission made no finding that under the sugar rate adjustment proposed by the carriers there would be a violation of Section 4. The carriers proposing the reduced rates from New Orleans did not seek relief from this section, and the Commission itself pointed out (R. 43) that the carriers explained that the proposed rates from the South to the water competitive points were blanketed back to the interior, among other reasons, because of the uncertainties and difficulties attending applications for fourth section relief. Appellants sought to prove that a fourth section departure exists in the rates from New Orleans (R. 143). This was disputed by interveners (R. 160). Not all departures from Section 4 are unlawful. Under that section the Commission has the power to authorize the carriers to charge less for a longer than for a shorter distance. (*Intermountain Rate Cases*, 234 U. S. 476, 485.)

If the appellant believes there are fourth section departures in the adjustment that have not been authorized by the Commission, the appellants should call the Commission's attention to those departures. This is not a question that affects the appellant in any way, or one which gives it any right to complain in such proceeding as the present one.

X.

The denial by the Commission of appellant's motion for a rehearing was not a denial of a right guaranteed by law. The Commission's report and order in this case were handed down on July 3, 1933 (R. 19). Appellant waited until after it had received the Commission's report and order before filing, on or about July 25, 1933 (R. 142), its motion for a rehearing in which it set out alleged changes in conditions. Appellant never contended that the alleged changes in conditions arose only after the date of the Commission's decision, July 3, 1933.

The case does not come within the principle announced in *A. T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, the Western Grain Case, but rather the more recent decision in *United States* v. *Northern Pacific Co.*, 288 U. S. 490, in which this Court held that if the situation had changed since the date of the hearing, it was incumbent upon the appellant to bring the alleged change in conditions at once to the Commission's attention without waiting for the decision of the Commission.

Wholly aside from this point, however, appellant's motion for a rehearing showed on its face that the Commission was amply justified in denying it.

ARGUMENT.

APPELLANT HAS NOT BEEN SUBJECTED TO ANY LEGAL WRONG BY THE COMMISSION'S ORDER AND HAD THEREFORE NO LEGAL RIGHT TO INSTITUTE THIS SUIT.

At the very threshold of this case we are confronted with the question whether appellant has been subjected to any legal wrong by the Commission's order and whether it had the legal right to institute this suit. A review of the facts and the law will show that appellant has no legal right or interest that will be injuriously affected by the order in this case.

Appellant is a water carrier operating a line of towboats and barges on the Mississippi and Ohio Rivers (R. 2). It transports as a common carrier freight in interstate and foreign commerce between New Orleans, Louisiana, Cincinnati, Ohio, St. Louis, Missouri, and intermediate ports (R. 2).

Appellant is neither a shipper nor a receiver of shipments of sugar. It pays no freight charges on such shipments. The rates considered by the Commission in its decision in this case were not the rates of appellant. They were the all-rail rates of the rail carriers from New Orleans to points in the North. Neither the findings nor the order of the Commission require any action on the part of appellant.

Barge-rail rates on sugar from New Orleans to points in the North as heretofore stated are usually constructed by deducting from the through all-rail rate from New Orleans to the destination point an amount equivalent to 20 per cent of the all-rail rate on sugar from New Orleans to the river ports reached by the barge line (R. 39).

While, as stated, this has been the general basis for the construction of barge and rail rates (*Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers*, 153 I. C. C. 129, p. 132; *Application of Mississippi Valley Barge Line Company, Ex Parte No. 99*, 167 I. C. C. 41, p. 45; *Application of American Barge Line Company, Ex Parte No. 102*, 188 I. C. C. 521, p. 526), these barge lines, including appellant, may, if they desire to do so, maintain the same rates as the rail carriers or maintain rates that reflect smaller differences between the all-rail rates and the barge-rail rates than the differences that would result if the 20 per cent basis, the usual basis, were followed.

The Commission pointed out in its decision (R. 37) that these barge lines, including appellant, do not adhere absolutely to the usual differential basis on all traffic. The mere fact, therefore, that the rail carriers reduced their all-rail rates did not require appellant or any other barge line to make any reductions in either its port-to-port rates or its barge-rail rates. Indeed, the barge lines, including appellant, in so far as their port-to-port traffic is concerned, are subject to no regulation whatever, and may make whatever port-to-port rates they choose.

The amended order of the Commission in this case (R. 67) dealt with the all-rail rates only. It was not addressed to and required no change in any rate of appellant. And the fact that the rail carriers established on their own volition and without a mandatory order on the part of the Commission the rates which the Commission found in its decision they had justified for application on sugar from New Orleans to destinations in the North, likewise did not require any change in the rates of appellant. The question in any case whether appellant should reduce its port-to-port rates or its barge-rail rates, following reductions made in the all-rail rates by the rail carriers, is one for the determination of appellant alone.

Appellant had the right to file a protest with the Commission against the reduced rates on sugar proposed by the rail carriers from New Orleans to points in the North. It filed such a protest (R. 2). When the Commission, following the protests made by appellant and others against the proposed sugar rates, suspended those rates pursuant to the authority vested in he Commission by Section 15 (7) of the Interstate Commerce Act (49 U. S. C., Sec. 15 (7)), appellant had the right to appear and offer testimony before the Commission in opposition to the proposed rates, which it did; and the Commission's decision deals at length with the testimony offered by appellant (R. 32, 39, 40, 41, 42, 45, 46, 48). But does the fact that appellant appeared before the Commission, as it had a right to do under Section 15 (7) of the Interstate Commerce Act, and offered testimony, give it the right to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened injury to it? The answer is found in the decisions of this Court.

In *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, this Court had before it a suit to set aside an order of the Commission granting a certificate of public convenience and necessity to the Wheeling & Lake Erie Railway Company, of which the Pittsburgh & West Virginia was a minority stockholder. This Court said in part (p. 486):

> "The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside the order, because it had intervened in the proceedings before the Commission, and

> —because it is a connecting carrier and a minority stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it. *Sprunt & Son* v. *United States,* 281 U. S. 249. * * *"

In the more recent case of *Moffat Tunnel League* v. *United States,* 289 U. S. 113, the court had before it a suit by the League against the United States, the Interstate Commerce Commission, and the Denver & Rio Grande Western Railroad Company, to set aside an order of the Commission authorizing that company by stock purchase to acquire control of the Denver & Salt Lake Railroad Company, called the Moffat Road. This Court said (p. 119) that the Act providing for the institution of suits to set aside an order of the Commission does not specify the classes of persons, natural or artificial, who may sue, or what shall constitute a cause of action for the setting aside of an order, but that it does require that the petition shall set forth "the facts constituting petitioner's cause of action" and by other provisions shows that for failure to do so the suit shall be dismissed (Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. Sec. 45). The Court further said that consequently the complaint must show that the plaintiff has or represents others having a legal right or interest that will be injuriously affected by the order, citing *Edward Hines Yellow Pine Trustees* v. *United States,* 263 U. S. 143, p. 148; *Sprunt & Son* v. *United States,* 281 U. S. 249, p. 254; *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479, p. 486.

In *Sprunt & Son* v. *United States,* 281 U. S. 249, this Court had before it the validity of an order of the Interstate Commerce Commission requiring certain carriers to remove, in a manner prescribed in the order, undue preference and prejudice caused by their rates on cotton from interior points to ports on the Gulf of Mexico. The Commission found that the adjustment of rates unduly preferred Sprunt & Son and described the manner in which the undue preference should be removed. Sprunt & Son brought suit to enjoin the enforcement of the order. Another suit was brought by the rail carriers to enjoin the enforcement of the order. Upon final hearing the District Court sustained the validity of the order and entered a decree dismissing the bill. None of the carriers appealed from the decree.

This Court, after referring to the interest that Sprunt & Son had in the controversy, an interest that entitled them to intervene in the administrative proceeding before the Commission, said in part (p. 255):

> "* * * And if they (Sprunt & Son) did so, they became entitled under Section 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled, as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. * * *"

Continuing, this Court said (p. 256):

"Appellant's present position resembles in all essentials one which was put forward in *Edw. Hines Yellow Pine Trustees* v. *United States,* 263 U. S. 143, 147, 148, 68 L. Ed. 216, 220, 221, 44 Sup. Ct. Rep. 72, and *United States* v. *Merchants & Mfrs. Traffic Assn.* 242 U. S. 178, 188, 61 L. Ed. 233, 239, 37 Sup. Ct. Rep. 24. There, as here, the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs there, as here, were not subjected to or threatened with any legal wrong. And since the carriers acquiesced in the order of the Commission, the plaintiffs could not maintain an independent action to annul the order. * ** *''

It cannot be, therefore, that when the Commission has found that rates proposed by rail carriers violate no provisions of the Interstate Commerce Act, or that when the Commission has found that rates somewhat higher than the rates proposed by the rail carriers would not violate that Act, and when the rail lines accept those rates, a barge line such as appellant can have any legal right to maintain an independent suit to set aside an order which in fact did not require the rail carriers to publish any rates, but merely left the rail carriers free to publish certain rates if they chose to do so, and which order, moreover, was not directed to barge lines and required nothing whatever of them.

If the rates which the carriers published following the decision of the Commission in this case are not in violation of the Interstate Commerce Act, and the Commission has so found, no legal right of appellant was invaded by their establishment.

Appellant says (p. 84) that it readily concedes that the removal of a competitive advantage, or even the diminution of a competitive equality, to which a party has no legal right, does not give that party any standing in court, and that no legal right in such a case has been invaded and therefore no legal damage has been suffered. But appellant goes on to say that this is very different from appellant's situation, that appellant has suffered legal damage by virtue of the invasion of a legal right to a continued existence.

And appellant in seeking to distinguish the *Sprunt Case* from its situation (p. 82), while admitting that Sprunt's legal right was the right to a rate not unduly prejudicial, says that its position is precisely the opposite, that it alleges and shows that the existing rates violate its legal right granted by Section 500 of the Transportation Act, 1920, to continue its existence as a water carrier.

The Interstate Commerce Act does not guarantee to the rail carriers a legal right to a continued existence. That Act is not a guarantee that rail operations will be profitable, or that rail carriers will be given immunity from competition by other agencies of transportation and will be protected from such competition. The large number of railroads now in the hands of receivers shows that these railroads were not given by the Interstate Commerce Act "a legal right to a continued existence," to use the language of the appellant. Section 500 does not guarantee to the appellant a legal right to a continued existence, nor does it guarantee to the appellant an immunity from competition.

The Commission in its last annual report again had occasion to refer to the ever-increasing diversions of traffic from the railroads to the competing agencies of transportation, including these barge lines. The Commission said (47th Annual Report, December 1, 1933):

> "We have had occasion in previous reports to point out that the financial difficulties of the railways are the result of more than one cause. In large part they are the reflection of the reduction in traffic that came with the economic depression but also in considerable part they result from the competition of other transport agencies. * * *" (P. 1).

> "An outstanding feature of the evidence is with respect to the already great and constantly increasing diversions of traffic from the railroads to motor trucks and to boats and barges, particularly to the trucks. These diversions have now attained such proportions and threaten such further expansions as to constitute a serious menace to the future integrity of the railroads." * * * (p. 8).

To paraphrase the language of this Court in the *Sprunt Case*, the fact that appellant may be deprived of a competitive advantage that it has enjoyed by reason of the substantial differences between the all-rail rates and the barge rates, differences that have been so great that the sugar traffic has been driven from the rail carriers, does not subject appellant to any legal wrong.

In *Pennsylvania Railroad Co.* v. *United States*, 40 Fed. 921, the Pennsylvania Railroad Company sought to set aside an order of the Commission granting a certificate of public convenience and necessity to the Pittsburgh & West Virginia Railway Company to construct a branch line of railroad to a point served exclusively by the Pennsylvania. The court said in part (p. 924):

> "True the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits for handling all the traffic flowing in and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it is found somewhere in the law written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve the community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920,—does not explicitly or implicitly accord a noncompetitive traffic area to the first taker as a law accords a trade-mark to the first adopter. Instead of doing this the writen law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another upon a showing of convenience

> and necessity of more transportation service for those inside reaching out and those outside reaching in. Where, as here, the showing is lawfully made that the Commission has validly acted, the carrier at whose expense the change is wrought has had no legal right invaded and has suffered no legal injury."

THE CASE NOW BEFORE THIS COURT HAS BECOME MOOT.

The Commission's order in this case (R. 67) shows on its face that it does not require the carriers to establish any rates whatever. It will be recalled that the Commission found in its decision (R. 49) that the record afforded ample justification for the proposed rates that were based upon a minimum weight of 60,000 pounds per car, that the respondent carriers had not justified the proposed rates based upon a minimum weight of 80,000 pounds per car, but that they had justified rates 4c higher.

The Commission carrying out the findings that it made in its decision, ordered (R. 67) that the order previously entered in the proceeding suspending the operation of the tariffs, be vacated in so far as it related to rates based on a minimum weight of 60,000 pounds. The order further required the carriers to cancel their schedules naming rates based on a minimum of 80,000 pounds.

It is plain that under this order the carriers, had they chosen to do so, could have continued in effect the then existing rates on sugar from New Orleans to points in the North, for there was no requirement in the order that made it mandatory upon the carriers to change any of their then existing rates on sugar.

The effect of the Commission's report and order was to enable the carriers, if they decided to do so, to reduce their rates to a level not lower than that found justified by the Commission in its decision. Reduced rates on sugar from New Orleans not lower than the rates that the Commission in its findings found that the carriers had justified (R. 49, 50) were published by the carriers and are now in effect from New Orleans (R. 14).

The rates now in effect having been published by the carriers as a result of the voluntary action of the carriers, and not pursuant to any order of the Commission requiring the establishment and maintenance until the further order of the Commission of such rates, the case presented by appellant to this Court has become moot. Even if the Commission's order were set aside, it would leave unaffected the right of the rail carriers to continue the maintenance of the present rates, for the order does not require the maintenance of any specific rates as maximum rates. The carriers are free, so far as this order of the Commission is concerned, to continue the present rates, to propose increases in those rates or reductions. Any tariff schedules naming changes, either in the way of increases or reductions, would of course be subject to the power of the Commission under Section 15 (7) of the Interstate Commerce Act (49 U. S. C., Sec. 15 (7)), to suspend such schedules and to enter upon a hearing concerning their lawfulness.

As stated by this Court in *Sprunt & Son* v. *United States*, 281 U. S. 249 (p. 257):

> "Moreover, by the action of the carriers, the issue of undue prejudice and unjust preference, which had been passed upon by the Commission has become moot. Compare *United States* v. *Anchor Coal Co.*, 279 U. S. 812, 49 S. Ct. 262, 73 L. Ed. 971. Most of the carriers never sought to annul the order. Those that joined in the suit to set it aside have since voluntarily severed themselves from the shippers who object to it. The fact that some carriers at one time protested is of no significance, among other reasons, because their protest may have been

> directed not against that part of the order which commanded an equalization of rates, but against the particular figure at which equalization was ordered. There is nothing to show that any carrier is now in sympathy with the appellants' attack on the order. A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so."

The intervening rail carriers are not seeking in this proceeding or in any other to set aside the Commission's order. Exercising the choice which they had, they made effective the reduced rates on sugar which were no lower than the minimum rates which the Commission in its decision herein found that they had justified. A judgment in appellant's favor under the circumstances, to use the language of this Court in the case just cited, would be futile, for it would not restore the appellant to the advantage previously enjoyed. The carriers would be free to continue the present rates.

The carriers can not be required to change their voluntarily-established rates until the Commission has first found that those rates are in violation of some section of the Interstate Commerce Act, and then only after a hearing. Under the circumstances here present, the case becomes moot, and the appellant is relegated to such rights as it has under Sections 13 (1) and 15 (1) of the Interstate Commerce Act (49 U. S. Sec. 13 (1) and Sec. 15 (1)), to file a complaint attacking the existing voluntarily-established rates of the rail carriers, if it believes that under present conditions these rates are unlawful in any respect. As stated by this Court in the *Sprunt* case, 281 U. S. 249 (p. 255):

> "Why the carriers filed the new rate structure now in force is no concern of appellants. If the

> carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy. * * *"

Appellant argues (p. 105) that upon an annulment of the order here complained of it would be the duty of the Commission under Section 15 (1) of the Interstate Commerce Act (49 U. S. C., Sec. 15 (1)), to exercise the initiative that the Commission has of instituting an investigation and of effecting a change in the rates. This section, as shown by the quotation that appellant has made from it, authorizes the Commission to prescribe rates only after a hearing, and on the theory here advanced by appellant the rates now in effect could not be changed by the Commission in the absence of a hearing.

Appellant goes on to say (p. 106):

> "Even assuming, however, that the Commission would have no duty—and no power upon its own initiative to take action in regard to these rates, the question still is not moot. Upon annulment of the present orders, appellant, or anyone similarly situated, could file a complaint before the Commission, and the Commission, in acting upon said complaint, would be bound by the principles announced by this Court in its order of annulment. * * *"

Appellant here gives away its case, and proves that the case now before this Court is moot. Appellant can file a complaint with the Commission at the present time attacking the existing rates, without awaiting a decision of this Court. What appellant really seeks is an opinion of this Court that will direct the Commission to apply in a manner prescribed by this Court the standards in the Interstate Commerce Act which govern and control the action of the Commission. Appellant here asks the Court to weigh the facts found by the Commission, to inquire into the soundness of the reasoning by which it reached its conclusions, to question the wisdom of those conclusions, and to consider whether on like facts this Court would have made a similar ruling. Appellant, in short, asks this Court to convert itself into a rate-making body. All these things this Court has repeatedly said it will not do. (*Western Paper Makers' Co.* v. *United States*, 271 U. S. 268; *Assigned Car Cases*, 274 U. S. 564, p. 581.) Even though this Court announced "certain principles", it would still be within the Commission's power to apply those principles. Appellant really wants a ruling by this Court that will control and fix the measure itself of the rates on sugar from New Orleans. Appellant desires a decision from this Court to the effect that the rates found not unlawful by the Commission, are in fact unlawful, and that certain other designated rates will be lawful rates.

Appellant argues that the decision in the Sprunt case is distinguishable from the case at bar (p. 108), that a decision in appellant's favor in the case at bar would impose a duty upon the Commission to reopen the case and substitute a lawful rate for the rates which this appellant seeks this Court to declare to be unlawful rates. This contention but gives further emphasis to the real aim of the appellant: to persuade this Court to fix on the findings made by the Commission minimum rates which will be somewhat higher than the minimum rates found not unlawful by the Commission in its decision in this case.

What appellant seeks is an opinion from this Court establishing principles that will shackle and control the discretion that the Commission has on the facts in cases as they arise before the Commission. It is a clear attempt to turn this Court into a rate-making body.

And when appellant says as it does (p. 112), that the relief prayed for will enable the appellant to bring a suit in equity against the several railways not now parties, to enjoin them from continuing in effect the rates objected to, appellant simply gives further emphasis to the fact that the decision sought from this Court would be but a step in a chain of litigation which in the end can only again impose upon the Commission, but after a hearing, the duty of determining what it has already determined: what would be reasonable minimum rates on sugar for New Orleans.

THE COMMISSION'S FINDINGS AND ORDER ARE NEGATIVE IN SUBSTANCE AND ARE NOT THEREFORE JUDICIALLY REVIEWABLE.

FOR THE ~~COMMISSION~~ Court TO TAKE JURISDICTION OF THIS CASE WOULD BE TANTAMOUNT TO THE USURPATION BY THE COURT OF THE COMMISSION'S FUNCTIONS.

The amended order in this proceeding and in the proceedings that were heard along with it (order of July 18, 1933, R. 67) contains two paragraphs that deal with the rates that were considered by the Commission in the case here before the Court, I. & S. Docket No. 3814, *Sugar From Gulf and South Atlantic Ports.*

The first paragraph merely provides that the order which the Commission had theretofore entered in I. & S. Docket No. 3814, suspending the operation of the schedules proposing reduced rates from New Orleans, be vacated and set aside effective July 9, 1933, in so far as it related to rates based on a minimum of 60,000 pounds. It will be recalled that the Commission found in its decision in this case (R. 49) that the record afforded ample justification for the proposed rates based upon a minimum of 60,000 pounds.

The second paragraph of the amended order (R. 67) deals with the rates based upon a minimum weight of 80,000 pounds which were before the Commission in this case, I. & S. Docket No. 3814. It will be recalled that the Commission in its decision found (R. 49) that the rates proposed by the carriers, based upon a minimum weight of 80,000 pounds were somewhat lower than the necessities of the situation required and had not been justified. This particular paragraph therefore directed the carriers who had published in their schedules the reduced rates from New Orleans based upon a minimum weight of 80,000 pounds to cancel the schedules containing such rates on or before September 5, 1933.

The Commission in its decision found that the carriers had justified rates based upon a minimum weight of 80,000 pounds 4c higher than those proposed, and the Commission said (R. 50) that the order would require the cancellation of the schedules naming the rates based upon a minimum weight of 80,000 pounds, but without prejudice to the establishment of rates in conformity with its conclusions.

It will thus be observed that the Commission's order in this case did not require the carriers to establish any rates whatsoever. The order left the carriers free to determine for themselves whether they would continue the rates that had been in effect, or would avail themselves of the opportunity and choice they had under the Commission's findings of publishing reduced rates that would at least be no lower than those which the Commission found the carriers had justified.

What in substance and in the last analysis was the decision of the Commission in this case? It found that certain rates proposed by the carriers had been justified, that is to say, would not be unlawful. It further found other rates proposed by the carriers had not been justified, but that rates 4c higher than such rates had been justified, that is to say, would not be unlawful.

These interveners submit therefore that these findings and order are negative in substance, and may not be made the subject of an appeal to the courts under principles well established in the cases which we shall later cite.

This question may also be approached from this aspect: The Commission is not required under Paragraph (7) of Section 15 of the Act (49 U. S. C. Sec. 15 (7)), to suspend every schedule naming a new rate that is filed with the Commission, whether that new rate be an increase or a reduction in the then-existing rate. Under the Rules of Practice of the Commission, interested parties, upon the filing of schedules naming new rates, are permitted to file protests against the rates, as the appellant did in the case of the rates here before this Court, and the carriers proposing the new rates are permitted to file replies thereto. The Commission then determines whether it will suspend the rates. It will not be argued that if the Commission had refused to suspend the rates that were proposed by the carriers in this case, such refusal could have been made the basis of an appeal to compel the Commission to suspend the rates. But the parties opposed to such rates would nevertheless have had the right, given to them by Sections 13 and 15 of the Act, to file a complaint with the Commission attacking the rates.

Now assume that the carriers in the first instance had proposed the very rates that the Commission in this case found justified, and that the Commission had permitted those rates to take effect without a suspension thereof. Assume also that a complaint had been filed by appellant, attacking the lawfulness of such rates. It is clear that the Commission, in the light of its decision in this case, would have found that such rates were not unlawful. Under the principles announced in *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, the order of the Commission dismissing such a complaint could not have been reviewed by any court.

The Commission has found that the rates of these interveners now in effect are not unlawful. It follows that the rights of appellant in this proceeding can not possibly be greater than its rights in a proceeding in which it attacked before the Commission the rates now in effect, and in which proceeding the Commission found the rates not unlawful and dismissed the complaint.

The following language from the decision in *Sprunt & Son* v. *United States,* 281 U. S. 249, applies with equal force to the present proceeding (p. 255):

> "Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *United States* v. *Merchants' & Mfrs. Traffic Assn.,* 242 U. S. 178, 188, 37 S. Ct. 24, 61 L. Ed. 233; *Great Northern Ry. Co.* v. *Merchants' Elev. Co.,* 259 U. S. 285, 295, 42 S. Ct. 477, 66 L. Ed. 943. The appellants' position is legally no different from what it would have been if the carriers had filed the rates freely, pursuant to an informal suggestion of the Commission or one of its members; * * *"

It is well established that not every order of the Commission is subject to review by the court.

The classic case is that of *Procter & Gamble Co.* v. *United States*, 225 U. S. 282. This Court had before it in that case an order of the Commission dismissing a complaint filed with the Commission by the Procter & Gamble Company in which that company charged that certain demurrage rules were repugnant to the Interstate Commerce Act. The Commission after a hearing had found that the rules complained of did not conflict with the Act and had dismissed the complaint. The Procter & Gamble Company later filed a petition in the Commerce Court in which it was charged that the Commission's order dismissing the complaint was null and void and beyond the power of the Commission, in that it sustained the validity of the demurrage rules. The United States challenged the jurisdiction of the Commerce Court to entertain the cause and moved to dismiss the petition. The Commerce Court held that it had jurisdiction of the cause and that the refusal of the Commission to afford relief was, for the purposes of the jurisdiction of the court, the exact equivalent of an order of the Commission granting affirmative relief. But on the merits it was decided that the Commission had rightly refused to grant the relief.

This Court said that before it came, if at all, to consider the merits, it was necessary to dispose of the question concerning the jurisdiction of the Commerce Court to entertain the petition. This Court, in holding that the order of the Commission which found that the demurrage rules were not unlawful was not judicially reviewable, said, among other things, that to construe the statute as giving the Court the power to review negative orders

"* * * would of necessity amount to a substitution

> of the court for the Commission, or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative. Third, because the result of the interpretation would be to bring about the contradiction and the confusion which it had been the inflexible purpose of the lawmaker from the beginning to guard against, an interpretation which would seemingly create rights hitherto non-existent and yet at once proceed to destroy such rights by bringing about a confusion which would render the rights which the Act creates practically valueless. * * *" (p. 292.)

This court in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, said (p. 483) that it is settled that the law does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its power, citing the Procter & Gamble case.

In *Alton Railroad Co.* v. *United States*, 287 U. S. 229, this court held that the order of the Commission there before the court was not of such a character as to be classed as a negative order, which could not be reviewed. The court in discussing the cases in which it had considered the extent to which orders of the Commission may be reviewed said in part (p. 238):

> "To take jurisdiction would not be tantamount to usurpation by the court of the functions of the Commission. The court is not called upon here, as it was in *Manufacturers' Ry. Co.* v. *U. S.*, 246 U. S. 457, 483, and *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 241, to afford relief which the Commission, in the exercise of its powers, had found that the complainant was not entitled to receive. The court is not asked to prescribe reasonable divisions, or to direct that they be prescribed by the Commission. The court is asked to find that the Commission denied the Alton a constitutional right as a result of acting upon erroneous principles of law and therefore to enjoin that part of the order."

What appellant asks this Court to do is to exercise administrative authority with respect to these sugar rates, and to find that the rates which the Commission found in this proceeding the carriers had justified and were therefore not unlawful were in fact unlawful. For the Court to take jurisdiction of this proceeding would be tantamount to usurpation by the Court of the functions of the Commission.

Appellant asks this Court to set aside that portion of the Commission's order that directs the carriers to cancel the schedules naming the rates based upon a minimum weight of 80,000 pounds. We doubt whether appellant has given mature consideration to the consequences that would follow. Appellant was opposed to these rates and it was based largely upon the testimony offered by appellant that the Commission found that the carriers had not justified these rates. If this Court entered a decree, the effect of which would be to set aside this portion of the Commission's order, it would seem that the carriers would then be permitted to publish the rates proposed by them, the very thing appellant is opposed to.

What appellant really seeks to control and change by this proceeding is the finding of the Commission in its decision (R. 49, 50) that the carriers had justified rates based upon a minimum weight of 80,000 pounds per car, 4c higher than the rates originally proposed by the carriers. We know of no power in any court to compel the Commission to retract a mere finding in its decision that certain rates have been justified, nor of any provision in the law which empowers a court to prevent a carrier from publishing rates which the Commission had found justified and which the Commission has declined to suspend. No court has the power to compel carriers to change lawfully published and established rates in the absence of a prior determination by the Interstate Commerce Commission that those rates are unlawful. The administrative discretion and powers of the Commission cannot be controlled in any such manner as appellant here seeks.

THE RAIL CARRIERS HAVE THE RIGHT TO CHANGE AND REDUCE THEIR RATES TO MEET COMPETITION, INCLUDING THE COMPETITION OF OTHER AGENCIES OF TRANSPORTATION, PROVIDED ONLY SUCH RATES ARE NOT IN VIOLATION OF INTERSTATE COMMERCE ACT.

Before considering the reasons set out by the appellant for the invalidity of the Commission's order, and particularly the alleged violation of Section 500 of the Transportation Act, we direct the Court's attention to what it has said respecting the right of a rail carrier to meet competition, to reduce its rates to meet competitive conditions, and the limitations upon this right. We do this for the reason that the appellant appears to proceed on the theory, as we shall later point out, that Section 500 of the Transportation Act, which declares it to be the policy of Congress to foster and preserve in full vigor both rail and water transportation, is a guarantee on the part of Congress that the appellant, a water transportation company, will be protected against the competition of other agencies of transportation, but that the rail lines that are subject to the Interstate Commerce Act are helpless to meet the competition of a water carrier such as the petitioner.

This Court in *Interstate Commerce Commission* v. *Chicago Great Western R. R. Co.*, 209 U. S. 108, quoted what Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, said in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 48 Fed. 37 (p. 50) that:

"Subject to the two leading prohibitions that their

> charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

Continuing, this Court said (p. 119) that it follows that railroad companies in fixing their own rates may take into account competition with other carriers, provided only that the competition is genuine and not a pretense.

In other cases this Court has referred to the fact that under the Interstate Commerce Act rail carriers have the power which they originally possessed to initiate rates, that is, to fix rates, or to increase or reduce them and to adopt such a policy of rate making as to them seems wise (*Skinner & Eddy Corp* v. *United States*, 249 U. S. 557, p. 564; *United States* v. *I. C. R. R. Co.*, 263 U. S. 515, p. 521; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, p. 636).

The Commission itself in a long line of cases has held that carriers may properly make rates to meet competitive conditions so long as the rates are not unduly low, do not burden other traffic and do not give rise to undue preference or prejudice. (*Cottonseed Products to Port Arthur*, 38 I. C. C. 378; *Vinegar Rates from Pacific Coast*, 81 I. C. C. 666; *Galveston Commercial Assn.* v. *G. H. & S. A. Ry. Co.*, 128 I. C. C. 349; *Iron and Steel Articles from the South*, 176 I. C. C. 345.) The Commission, in short, holds that carriers subject to its jurisdiction may reduce their rates, provided the reduced rates do not violate some provision of the Interstate Commerce Act.

The question then arises as to who is to decide how far rail carriers may go in reducing rates, and whether reduced rates proposed by them are unlawful in any respect. The duty of determining these questions has been entrusted by Congress to the Interstate Commerce Commission.

The appellant here asks this Court, in the absence of the record before the Commission and the facts which the Commission had before it, to determine that rates which the Commission has found were not unlawful, are in fact unlawful. The argument made by appellant in its brief was essentially one that should be addressed to the rate-making body.

It will now be our purpose to consider the reasons urged by appellant in support of its contentions that the order here assailed is unlawful. We shall in doing so point out that the Commission considered at length the question whether the rates would violate any provision of the Interstate Commerce Act.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION DOES NOT SANCTION A VIOLATION OF SECTION 1. THE FINDINGS OF THE COMMISSION IN ITS REPORT AMPLY SUSTAIN THE CONCLUSION THAT THE PROPOSED RATES ON SUGAR FROM NEW ORLEANS TO DESTINATIONS IN THE NORTH WERE NOT UNREASONABLY LOW.

The Commission in its decision found with respect to the rates proposed from New Orleans that there could be no reasonable doubt that they were high enough to pay more than the cost of service (R. 49). The District Court in its finding of fact found (R. 102) that the Commission had found that the rates which it approved would be compensatory, the court quoting the facts which the Commission set out in its decision in support of this finding (R. 102-102). These facts are (R. 49):

(1) The earnings would compare favorably with those of the eastern lines under the reduced rates from refineries on the Atlantic Coast to points in the Central West proposed by the Eastern carriers and considered by the Commission in an earlier portion of its decision. (R. 23-35).

(2) The Commission found these facts respecting the earnings under the reduced rates proposed by the Eastern carriers from refineries on the Atlantic Seaboard (R. 35):

> "No question can fairly be raised as to the proposed rates being high enough to yield considerably more than the cost of the service. They are not in the lower reaches of the scale. Sugar loads heavily, and it can probably be used to fill cars that would otherwise move west empty. The earnings on a normal shipment, about 50,000 pounds, at the (fol. 45) proposed rates from and to the principal points would range from about $145 to $210 for hauls ranging from about 500 to 900 miles. They would compare favorably with those under many rates prescribed by us on other commodities."

(3) The earnings under the rates proposed from New Orleans would generally accrue from single-line straight away water-level hauls by economically and efficiently operated carriers in a territory of high traffic density.

(4) The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240.00 per minimum carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26c. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15c per car mile and 6 mills per ton mile.

(5) The traffic considered would be principally added tonnage that could probably be carried at far lower costs.

(6) Many commodities are handled by the respondents at much lower charges than they here propose for sugar.

We direct attention at this point to these numerous findings of fact on the part of the Commission that support the Commission's conclusion (R. 49) that the rates proposed by the railroads from New Orleans were high enough to pay more than the cost of the service.

Appellant undertakes to summarize in its brief (p. 40) the facts stated by the Commission in its decision to support the finding that the rates are high enough to pay more than the cost of the service, but it will be observed that appellant omitted several of the findings as, for example, the specific finding that the Commission made respecting the rates from the refineries on the Atlantic Coast (R. 35), the finding that the proposed rate of 30c from New Orleans to Chicago would yield car-mile earnings of 26c, the finding that the system costs for all traffic on the Illinois Central are about 15c per car-mile, and the finding that the earnings would generally accrue for single-line straightaway water-level hauls by economically and efficiently operated railroads in a territory of high traffic density.

It will furthermore be borne in mind that the findings of the Commission (R. 49) respecting the earnings per car ($240.00), per ton mile (6.5 mills), and per car mile (26c), under the rate from New Orleans to Chicago, were all predicated upon the rate of 30c originally proposed by the carriers. But the Commission found (R. 49) that this 30-cent rate was lower than the necessities of the situation required, and found that the carriers had justified a rate 4c higher or 34c. The earnings under this rate of 34c would be $272.00 per car, about 7.4 mills per ton per mile, and about 30c per car mile.

Appellant has wholly ignored in its argument the increased earnings under the rates on sugar from New Orleans that the Commission found the carriers had justified. If there can be no reasonable doubt that the rates as originally proposed were high enough to pay more than the cost of the service, and the Commission so found (R. 49), then the rates as increased obviously would pay substantially more than the cost of the service. The earnings per ton per mile of 7.4 mills and per car per mile of 30c under the rate of 34c found justified by the Commission for application from New York to Chicago may be compared with the system costs for all traffic on the Illinois Central Railroad of 6 mills per ton per mile and of 15c per car mile. The Commission has repeatedly said that both ton mile and car mile earnings merit consideration (*Ex-Lake Iron Ore Rates From Chicago*, 123 I. C. C. 503, p. 505; *Advances in Rates for the Transportation of Coal*, 22 I. C. C. 604, p. 620). It is significant that appellant in its consideration of the findings of the Commission and in its argument on the question of whether the rates are compensatory omits any reference to the car-mile earnings.

The Commission points out that the tonnage would be principally added tonnage that probably could be carried at far lower costs. The Commission here had reference to the well-recognized principle that additional traffic can be handled by the railroads without proportionate increases in expenses. In *New York Central R. R. Co. Acquisition of B. C. G. & R. R. Co.*, 180 I. C. C. 538, the Commission said in part (p. 557):

> " * * * Very generally additional business can be handled by railroads without proportionate increase in expenses, and there is manifestly a com-

> mercial advantage in the gain of traffic which can produce revenues in excess of actual additions to expense, or added out-of-pocket expense. This advantage is, of course, commercially valuable. * * *"

It is significant that appellant wholly fails in its argument to give any consideration to this finding of the Commission.

It was based upon these findings of fact that the Commission reached the conclusion (R. 49) that "there can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service."

The evidence before the Commission was not presented to the District Court and is not a part of the record before this Court. As stated by the District Court, 4 Fed. Supp. 745, p. 747 (R. 97), in view of the absence of the record of the evidence which the Commission had before it, the court must accept its findings as conclusive. Appellant can not contend that the order was unsupported by the evidence when the evidence upon which the Commission acted was not introduced before the court (*Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 262 U. S. 318, p. 324; *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114, p. 116; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, p. 125).

The facts stated by the Commission in its report show that they overwhelmingly support the conclusion that the proposed rates are high enough to pay more than the cost of the service.

Appellant argues (p. 41) that there is nothing in these particular findings which contains a definite and positive statement that the rates which the Commission approved would be reasonable or compensatory. Appellant has overlooked the unequivocal finding (R. 49) that "there can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service.

Appellant says that this is not a finding by the Commission that rates are either reasonable or compensatory, that it is a finding alone that the rates charged pay alone the out-of-pocket cost. It is plainly a finding that the rates are not unreasonably low and that they pay much more than the out-of-pocket cost, that they in fact pay more than the cost of the service. There is a substantial difference between the rates that pay more than the cost of the service, and rates that pay only the out-of-pocket cost. The Commission, when it uses the phrase "out-of-pocket costs," refers to costs that are incurred by the rail carrier for handling traffic which it would not otherwise incur were that particular traffic not handled, that is to say, the additional cost that it must incur by reason of placing that traffic in the train. (*Transcontinental Cases of 1922*, 74 I. C. C. 48, p. 68-71.)

Appellant goes on to say (p. 50) that this finding of the Commission falls far short of the finding that the rates are of such a character as will enable the rail lines to continue as sufficient and effective transportation agencies, that such a finding does not give consideration to the necessary cost and expense which rail lines must pay in order to cover overhead, maintenance, repairs, and interest. Appellant seems to assume that the rail lines can obtain the funds to enable them to make these payments even though they transport no traffic. The rail lines proposed those reductions in the rates in order to enable them to meet these payments, by regaining some share of the sugar traffic which they have lost to these competitive agencies of transportation. The Commission itself gives emphasis to the enormous losses that the rail carriers have sustained in the sugar traffic that they formerly transported (R. 21, 22, 23, 24, 36).

Appellant refers (pp. 43-44) to certain statistics taken from the annual reports of the Interstate Commerce Commission, all for the purpose of proving that the system costs of handling freight on the Illinois Central are not 6 mills per ton mile but considerably higher. Appellant assumes that the question whether the rates approved by the Commission are reasonable and compensatory will be tried out anew on facts that are not before this Court. But it is not necessary here to undertake to point out the many fallacies in appellant's computations. It is merely sufficient to say that appellant was given every opportunity before the Commission and took advantage of that opportunity to present all the evidence it desired on the question whether the proposed rates would be reasonable and compensatory. Appellant has not brought before this Court the record before the Commission and it may not therefore question in this Court the sufficiency of the evidence to sustain the findings of the Commission. Appellant seeks in this Court to argue the weight of the evidence before the Commission but without the evidence upon which the Commission acted. This Court has said many times that it will not consider the expediency or wisdom of the Commission's order, or whether on like testimony it would have made a similar ruling, that the Commission's findings are made by law *prima facie* true, and that this Court ascribes to them the strength due to the judgments of a tribunal appointed by law and informed by experience. (*Interstate Commerce Commission* v. *Union Pac. R. R. Co.*, 222 U. S. 541, *Ill. Cent. R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441.) To consider the weight of the evidence is beyond the province of the Court. (*Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268.) This Court has, furthermore, said that papers in the Commission's files are not always evidence in the case, that nothing can be treated as evidence which is not introduced as such. (*United States* v. *A. & S. Ry. Co.,* 265 U. S. 274, p. 288.)

All these considerations show that the point that appellant now seeks to make in this Court was essentially one for determination by the Interstate Commerce Commission.

The question whether the proposed rates would be reasonable and compensatory was one to be determined by the Commission, upon evidence and after a hearing. It was so determined and may not under the circumstances here present now be questioned.

Appellant lays great stress (p. 45) upon the sugar rates formerly in effect, pointing out that these rates were established following the suggestions of the Commission in its decision in the *Sugar Cases of 1922,* 81 I. C. C. 448, and that the rate of 54c formerly in effect from New Orleans to Chicago was less than a reasonable or compensatory rate.

Appellant overlooks the fact that there may be a substantial difference between a reasonable maximum rate and a reasonable minimum rate, that the Commission was called upon to determine in this particular case what would be reasonable minimum rates. The circumstances and conditions surrounding the sugar traffic had furthermore undergone a substantial change since the decision of the Commission in the *Sugar Cases of 1922, supra,* (decided July 17, 1922). In the decade since 1922 this country has seen the growth, as the Commission pointed out in its decision (R. 21), of "new and powerful competitive forces in the form of water and truck carriers that maintain much lower rates than the rail carriers."

There is no requirement in the law that when such a sweeping change in conditions occurs the rail carriers are without any power to establish rates that will give their all-rail routes an equality of opportunity with the water and truck routes of their competitors, and that will enable them to retain some fair share at least of the traffic that they must have if they are to continue to provide an adequate system of transportation for the public generally.

Appellant argues that the proposed rates were lower than necessary to meet the charges of the responsible and reliable barge lines, and refers to the rates of these lines from New Orleans to St. Louis, Cincinnati, and Louisville as compared with the proposed rates of the carriers (pp. 52-53). Appellant here refers to only some of the facts set out in the report of the Commission, and seeks to confine the Court's consideration of the issues to the particular facts selected by the appellant. The rail carriers were concerned not only with the competition by water from New Orleans to St. Louis, Cincinnati and Louisville; but with the competition from New York to Chicago, competition considered at length by the Commission in its decision (R. 23-28). The Commission points out (R. 26) that the average rate initially charged from New York to Chicago was evidently less than 27c but perhaps more than 22c, this rate including the cost of loading, unloading on warehouse floors or into cars at destination water-front, and marine insurance. The Commission dealt at length with the terminal expenses connected with the handling of waterborne traffic, the delays enroute, and fixed an all-rail rate from New Orleans to Chicago of 34c, considerably higher than the cost of transporting sugar by the water-competitive route from New York to Chicago.

Appellant goes on to say (p. 53) that the decision of the Commission indicates that the carriers by their proposed rates intended to meet the competitive rates of the contract barge operators, but that the Commission expressly denies this inference when it specifically finds that nine-tenths of the waterborne sugar moving from New Orleans to St. Louis was transported on rates of 37 and 42 cents (R. 44). This is a very inadequate and incomplete portrayal of the whole situation that the Commission had before it.

The cost of moving sugar by contract barge from New Orleans to St. Louis was according to one witness about 23c and according to another witness about 29c (R. 40). The decision shows that, while most of the sugar had been moved in barges of the standard companies (R. 44), the practice of shipping sugar in contract barges developed rapidly in 1932, that at least two of the largest refiners resorted to it as a means of meeting the flood of sugar moving by water from the East and California, that one refiner financed barge operations and was thus in a position to dictate what rates should be charged, that the carriers were apprehensive about the situation and feared that if the tendency was not stopped, all the refiners, to protect themselves, would use contract barges or provide their own barges, that petroleum, steel, and cotton interests had already entered the river transportation business to a greater or less extent (R. 43-44).

Certainly these were all facts that the Commission was justified in considering. It was not required to take a few isolated facts from the record and base its decision on those facts alone. It had the right and the duty to consider and weigh all the facts, and upon those facts to determine whether the rates proposed were unreasonably low.

The length of the decision (R. 19 to 61) gives some clue to the almost infinite number of facts before the

Commission in this case, and to the care with which the Commission considered and weighed those facts. There can be no doubt but that the facts found by the Commission in its report overwhelmingly support the conclusion of the Commission that the rates proposed by the rail carriers from New Orleans to northern destinations would pay more than the cost of the service. They were, therefore, not unreasonably low, and were not in violation of law.

SECTION 500 OF THE TRANSPORTATION ACT DOES NOT MAKE UNLAWFUL ANY RATE WHICH UNDER THE INTERSTATE COMMERCE ACT IS A LAWFUL RATE.

THE COMMISSION'S DECISION MOREOVER SHOWS THAT THE COMMISSION IN PASSING UPON THE ISSUES IN THIS CASE CONSTRUED AND APPLIED THE INTERSTATE COMMERCE ACT IN THE LIGHT OF SECTION 500 AND THE POLICY OF CONGRESS THEREIN DECLARED.

Appellant argues (p. 54) that the express findings contained in the Commission's decision in this case and the inferences therefrom establish the fact that the Commission refused and failed to give effect to Section 500 of the Transportation Act of 1920 (49 U. S. C. Sec. 142), and that the order in this case is therefore unlawful and void.

Section 500 reads as follows:

> "Sec. 500 (U. S. Code, Title 49, Section 142).—It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

Appellant's petition makes repeated references to Section 500 (R. 2, 3, 5, 6, 9) and thus gives emphasis to the reliance that the appellant places upon Section 500.

Section 1 (R. 2) states, among other things, that appellant undertook the operation of a line of barges on the Mississippi and Ohio Rivers by reason of the assurance that water transportation would be preserved in full vigor under the mandate of federal enactment. Section 3 (R. 2, 3) states that the Commission is charged with the administration and enforcement of Section 500. Section 9 (R. 5) quotes Section 500 and charges that the Commission has entirely failed and refused to give effect to this section, and that the decision of the Commission now before this Court "contravenes the mandate that water transportation be fostered and preserved in full vigor."

It is apparent from these and other allegations in the bill (Sec. 13, R. 9, Sec. 18, R. 14), and from appellant's argument that appellant in the last analysis rests its case upon some sort of a guarantee that it has extracted from Section 500 that its operations will be made immune from competition, that it may change its rates to meet the competition of other carriers, including rail lines, but that rail carriers may not under Section 500 so reduce their rates as to enable the railroads to meet fairly and equitably the competition of the appellant.

We think it a fair statement that appellant's case in the last analysis rests upon this alleged violation on the part of the Commission of Section 500.

Section 500 is merely a declaration of policy on the part of Congress. It is not addressed to the Commission any more than to any other governmental body or officer. While it declares a policy of Congress, it prescribes no standards for the Commission or any other governmental body or officer to follow, and the Commission in so far as it may be required to give effect to this policy in construing the Interstate Commerce Act, the Act which the Commission administers and which contains the charter of its powers, obviously has a wide discretion upon the facts in the cases as they come before the Commission.

Section 500 lays down no standard by which the Commission may determine the lawfulness of freight rates. The standards that must guide the Commission in its determination of what constitutes lawful rates are found in the Interstate Commerce Act. As stated by this Court in *Keogh* v. *C. & N. W. Ry. Co.* 260 U. S. 156, (p. 162):

> "What rates are legal is determined by the Interstate Commerce Act."

The Interstate Commerce Act fixes the standards to be applied by the Commission in the cases as they come before the Commission. Rates must be just, reasonable, nondiscriminatory, nonpreferential and nonprejudicial. They may not, without the authority of the Commission, be in violation of the Fourth Section. But Section 500 of the Transportation Act contains no such standards. It merely declares the policy of Congress.

This Court in *Ann Arbor Railroad Co.* v. *United States,* 281 U. S. 658, had occasion to construe the joint resolution of Congress of January 30, 1925, known as the Hoch-Smith Resolution. Congress undertook to state in this resolution what policy of rate making should be pursued by the Commission. This Court said (p. 668) that the resolution did not purport to make any change in existing laws, but on the contrary required that law to be given effect, that it did not purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law.

To paraphrase the language of this Court in the case just cited, Section 500 of the Transportation Act does not purport to make any change in the existing law, to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law, that is, the Interstate Commerce Act. Section 500 does not give its own definition of a lawful rate, and what is a lawful rate must be determined by the application of the standards found in the Interstate Commerce Act.

There is no basis, therefore, for the contention that the Commission's order in this case is void because it sanctions a violation of a statute which merely declares the policy of Congress.

The Commission's decision shows on its face that what it determined was whether the rates proposed by the carriers on sugar from New Orleans would be in violation of any of the provisions of the Interstate Commerce Act, that is to say, whether they would be unreasonably low or unjustly discriminatory, or unduly preferential or prejudicial, or in violation of Section 4. The Commission pointed out that the carriers did not apply for Fourth Section relief (R. 43), that the rates would not be unduly preferential (R. 47-48), that certain of the proposed rates were lower than the necessities of the situation required (R. 49), that is to say, they would be unreasonably low, the Commission finding, however, that rates 4c higher than such rates had been justified. It is plain that the Commission in passing upon the issues in this case did precisely what the Interstate Commerce Act required it to do: to determine the lawfulness of the proposed rates by the standards laid down in the Act.

And the fact will not be overlooked that the evidence upon which the Commission acted is not before the Court and that the Court therefore cannot question the sufficiency of the evidence to support the findings of the Commission.

But even if it be assumed or conceded that the Commission is under the law required to apply and give effect to the declaration of policy contained in Section 500, an examination of the Commission's decision will show that in passing upon the issues before it the Commission had in mind this declaration of policy, and construed and applied the Interstate Commerce Act in the light of that declaration.

The Commission very recently made this statement respecting Section 500 in a case involving ex-river rates on coal (I. & S. Docket No. 3282, *Ex River Coal from Colona and Conway, Pa., to Youngstown, Ohio,* 197 I. C. C. 617, p. 633):

> "Whether the expression of Congress (Section 500) is to be regarded merely as a policy, or otherwise, the fact remains that that policy if it be merely a policy has not altered since the time of its expression and it is our duty as an agent of Congress to carry out that policy consistent with existing law."

The Commission in the second paragraph of its decision, after referring to the competition for the sugar traffic by rail, water and truck carriers, and the serious inroads that the water and truck carriers have made in the sugar traffic of the rail carriers, said (R. 22):

> "While the loss of traffic by the rail carriers is a matter for our serious consideration, the rights of the water and truck carriers and the value of their services to the public must not be overlooked. This is particularly true with respect to certain barge lines operating on the Mississippi, Ohio, and Illinois Rivers under our findings of public (fol. 36) convenience and necessity. See *Procedure Under Barge Line Act*, 148 I. C. C. 129; *Through Routes and Joint Rates*, 153 I. C. C. 129; *Application of Mississippi Valley Barge Line Co.*, 167 I. C. C. 41; *Application of American Barge Line Co.*, 182 I. C. C. 521; and subsequent reports."

That the Commission carefully considered and weighed the testimony offered before it by appellant is shown by the repeated and numerous references in the decision to the appellant and its testimony (R. 32, 36, 39, 40, 41, 42, 43, 44, 45, 46). A reference to these pages will disclose the patience and thoroughness with which the Commission reviewed and weighed the testimony offered by the protestants against the proposed rates, the principal protestant being the appellant in this case.

It is, moreover, of the greatest significance that appellant by the proposals that it made before the Commission respecting the all-rail rates from New Orleans to destinations in the North, proposals that are specifically referred to by the Commission in its decision, conceded that the all-rail rates from New Orleans under existing conditions were too high and that they should be substantially reduced. Appellant in its brief before the Commission said it suggested these reductions to afford rail carriers an "equal opportunity to compete with water carriers," and to "bring about a proper competitive balance." Appellant never ~~conceded~~ contended that a distribution of the sugar traffic out of New Orleans under which the barge lines, including appellant's line, carried for example in 1932 over 500,000 tons of sugar by water, about ten times as much as was carried out of New Orleans by the all-rail routes (R. 36), reflected a fair and equitable distribution of this sugar tonnage as between the railroads and the barge lines.

The all-rail rate formerly in effect from New Orleans to Chicago was 56c. The carriers proposed a rate of 30c based upon a minimum weight of 80,000 pounds per car (R. 38), while appellant suggested a rate of 40c (R. 39). The Commission approved a rate of 34c, 4c more than the rate proposed by the rail carriers, and 6c less than the rate proposed by appellant.

The all-rail rate formerly in effect from New Orleans to ~~St.~~ Louis was 52c. The rail carriers proposed a rate of 28c (R. 38). Appellant suggested a rate of 38c (R. 41). The Commission approved a rate of 32c, 4c more than the rate proposed by the rail carriers and 6c less than the rate suggested by appellant.

The facts just stated show how essentially this was a case for the determination of the Commission. There was no contention on the part of appellant that the rail carriers should be required to maintain the then-existing rates. Both the rail carriers and appellant proposed substantial reductions in the rates, and the real issue was what rates would not be less than reasonable minimum rates. The Commission's decision shows the almost infinite number of facts that the Commission had before it in passing upon this issue.

With this concession of appellant that the all-rail rates from New Orleans were too high, that they should reasonably be reduced, the Commission was required to determine whether the rates proposed by appellant or those proposed by the rail carriers should be fixed as reasonable minimum rates. The Commission, after considering the testimony and making an exhaustive review of the pertinent facts, concluded that the rates proposed by the rail carriers based upon a minimum weight of 60,000 pounds, had been justified, but that the rates proposed by the rail carriers, based upon a minimum weight of 80,000 pounds, were somewhat lower than the necessities of the situation required (R. 49), and found that the rail lines had justified rates 4c higher.

The Commission's decision indicates the extreme care with which it undertook to determine what would be a fair relationship between the rates of the rail carriers and those of these barge lines. It will be recalled that the port-to-port rates of the barge lines that have been given certificates of public convenience and necessity by the Commission are theoretically based upon 80 per cent of the all-rail rates between the ports, that is to say, the barge differential is 20 per cent of the all-rail rate, and that the barge-rail rates from New Orleans, for example, to an interior point in the North not located on a navigable stream, are arrived at by deducting from the all-rail rate this 20 per cent differential (R. 38, 39). Obviously, any reduction in the all-rail rates reduces this differential, and narrows the spread between the all-rail rates and the rates in connection with the water service of these barge lines. Thus when appellant conceded that the all-rail rate of the rail carriers was too high and should reasonably be reduced, this concession carried along with it a concession that the differential between the all-rail rate and the rates in connection with the water service was too great and should be narrowed.

The Commission itself found (R. 45) that the indications were that the differential is much too wide from a competitive-service standpoint, for the standard barge lines were taking most of the business.

In addition to the operations of the so-called "standard" barge lines, barge lines that had been granted certificates of public convenience and necessity by the Commission (R. 36), tramp or contract barges operated on the inland waterways. These tramp and contract barges did not join in through routes and joint rates with the rail carriers, but confined themselves solely to the transportation of port-to-port traffic. Neither their operations nor rates were to any extent whatever subject to the control of the Commission. Appellant treats this case as if the Commission had before it the operations of these "standard" barge lines only. The Commission's decision gives emphasis to the growing importance of the contract barges and to the apprehensions which the increasing use of the contract barges had caused on the part of the rail carriers (R. 43-45).

Certainly the Commission, in considering the issues in this case, was bound to consider and weigh not only the evidence dealing with the rates and the operations of these "standard" barge lines but with the operations of rates of these so-called "contract" barge lines. And its decision shows that it did so.

The Commission's decision indicates the thoroughness with which it undertook to determine what the port-to-port rates were of these barge lines, including not only the "standard" barge lines but the contract lines. It recognized, of course, that the port-to-port rates are not subject to regulation, that they are not required to be published, and that they may be changed from day to day.

Necessarily, under such conditions, a regulating body has difficulty in determining the actual rates that are being charged by the barge lines for the transportation of sugar not only from New Orleans to St. Louis, Cincinnati, Louisville, and Chicago (R. 39, 40, 41, 42), but from New York to Chicago (R. 26), and this difficulty the Commission experienced in this case.

And the Commission gave consideration to the fact that where the rates of these barge lines apply from port-to-port only, there are in many cases additional charges that must be added to obtain a rate comparable to an all-rail rate, such as the cost of getting the sugar to the barges, marine insurance, the unloading cost at destination, the cost of transferring the sugar at destination from the barge to the warehouse, and the damage on account of transportation by water (R. 26, 40).

Clearly, what the Commission did was to determine as accurately as it could upon conflicting evidence, what the total costs were of transporting sugar by barge from

New York to Chicago and from New Orleans to ports on the upper Mississippi and Ohio Rivers, and to determine what would be a fairly related rate by rail, and a rate, moreover, that would reflect the superior and more expeditious service inherent in rail transportation.

Let us consider briefly the situation with respect to the rates to Chicago for the purpose of showing just what facts the Commission had before it as disclosed by its decision. The Commission found (R. 26) that the average rate initially charged from New York to Chicago by water was evidently less than 27c and perhaps more than 22c. This rate included the cost of loading, unloading on warehouse floors or into cars at destination waterfront, and marine insurance. The Commission recognized as heretofore pointed out (R. 25) that it would be impossible to determine exactly just what the water rates were for the movement of sugar from New York to Chicago. The Commission pointed out that rates much lower than 22c and 27c had been quoted but had not been used (R. 26).

In order to meet at Chicago, the second largest city and the largest sugar market in the country (R. 21), the competition of the water carriers operating from New York, the Southern carriers proposed a rate of 30c from New Orleans.

Now the question before the Commission was whether this rate of 30c would enable the rail carriers fairly and reasonably to meet the competition of the water lines at Chicago, taking into consideration first, the cost of moving the sugar by water from New York to Chicago, and second, the superior service of rail transportation.

That the Commission gave consideration, and exhaustive consideration, not only to the question of what the water costs were but the question of what should be added to those water costs to reflect the added value of the rail service, is shown by the following from the Commission's decision (R. 27-28):

> "After inquiring into the question of what the water and truck rates are and what should be added roughly to represent unknown amounts for storage, switching transfer, and other services, we are faced with the question of how much more the rail service is worth in actual practice. Rail shipments generally reach destination in from four to six days, but water shipments are on the way two or three weeks. Rail service is also superior in that it is safer, involves less handling of and damage to packages, is more regular, and otherwise more dependable. Shipments by rail can be reconsigned or stopped in transit for partial unloading at nominal charges. However, unlike water service, rail service does not include loading and unloading, which cost the shipper perhaps 3 or 4 cents per 100 pounds. Water service can be used for a large part of the traffic without great inconvenience or disadvantage, rapid transit being generally unnecessary, but in certain respects, particularly at times, water service is not suitable for special shipments. Sugar lends itself to storage in large quantities, and distribution from warehouses by truck in small amounts is popular with the trade. Water service is never more desirable than rail service, except for reasons of economy or where slow movement is desired as a substitute for storage or in the case of a rising market. * * *"

The Commission pointed out (R. 28) that in these days when businessmen have to watch every penny, there is a strong inclination to use the cheapest mode of transportation even though not altogether satisfactory, that it would be helpful if the Commission knew what the water rates were, that if some water shipments paid 22c and others as much as 27c from New York to Chicago, the question arises as to what the rail rate should be (R. 28).

And the Commission, after considering whether the rates proposed by the eastern carriers from the eastern port to Chicago were less than reasonable minimum rates, and finding that they were not and that the proposed rate from Baltimore to Chicago, for example, of 39c was not unlawful (R. 29, 35) found, as stated, that the proposed rate of 30c from New Orleans to Chicago was lower than the necessities of the situation required but that the carriers had justified a rate 4c higher or 34c.

Thus the decision of the Commission shows on its face that it considered whether the proposed rates would be lawful rates under the standards laid down in the Interstate Commerce Act, but in the light of the declaration of policy contained in Section 500 of the Transportation Act. It considered what would be an all-rail rate that would be fairly related to the cost of transporting sugar by water and that would at the same time, to use the language of the Commission (R. 27), reflect how much more the rail service is worth in actual practice than the water service.

The Commission made the same analysis with respect to the rates to St. Louis. It found that the standard barge line rate from New Orleans to St. Louis was 42c, except that appellant maintained a lower rate of 37c (R. 39), that the rates of the contract barges from New Orleans to St. Louis were about 20c (R. 40), but that certain charges must be added to this rate of 20c to cover loading, unloading and marine insurance, that there was a dispute in the testimony as to how much should be added, one witness testifying that the amount should be between 3 and 4 cents and a witness for appellant testifying that it should be more nearly 9 cents (R. 40). Thus the total cost of shipping by contract barge from New Orleans to St. Louis was at least 23c according to one witness and 29c according to appellant's witness. The rail carriers proposed a rate of 28c from New Orleans to St. Louis. The Commission considered in detail the St. Louis situation, what the barge line differentials would be under the proposed rates, and concluded that the rate of 28c proposed by the rail lines was too low by 4c. Thus the rate became 32c and the barge line differential was reduced from 10c to 6.5c, the standard barge rate from New Orleans to St. Louis, by application of the 20 per cent differential to the rate of 32c, becoming 25.5c (R. 50).

The Commission referred to the fact (R, 40) that the traffic manager of one of the principal refiners suggested 6c as a proper differential for the standard barge lines under the rates of the all-rail lines, and that appellant proposed a rate of 38c from New Orleans to St. Louis, which on the 20 per cent basis would reduce the barge line differential from 10c to 7½c. If the rate of 28c proposed by the rail carriers from New Orleans to St. Louis had been approved by the Commission, the differential would have been reduced from 10c to 5½c.

We call attention to these further facts as giving some indication of the difficulties and perplexities of the problem that the Commission had before it, of the varied and numerous facts that were presented to the Commission, of the fairness and the openness of mind with which the Commission approached the question as to what would be a fair and equitable relationship between the all-rail rates of the rail carriers and the rates of these barge lines, and how such a relationship could be brought about.

It must be borne in mind that if the port-to-port rates of these barge lines were subjected to the same regulation as the rail rates of the railroads, the question could have been approached in an entirely different way and could have been dealt with in a different manner. If the Commission had had the power to fix the minimum rates of these barge lines, it could have fixed minimum port-to-port rates in the first instance and then determined what would be a just and reasonable differential to be added thereto to obtain the rates for the rail carriers.

But under the law as it now reads the Commission has no power whatever over the port-to-port rates of these barge lines and has no power to fix minimum rates for the transportation of property for a joint barge and rail service (Section 15 (1), 49 U. S. C. Sec. 15 (1)). Just and reasonable differentials between the all-rail rates and the rates in connection with the water service can, therefore, in the present state of the law be brought about only through reductions in the all-rail rates, and questions of how far these reductions may go, and what will be reasonable minimum rates, are under the law confided to the Interstate Commerce Commission.

Appellant argues that it does not contend that Section 500 grants it an immunity from competition (p. 49). But this in the last analysis is the substance of its contention. Appellant proceeds on the theory that under Section 500 it has the right to divert to its water routes traffic that formerly moved by the all-rail routes, and that Section 500 makes it impossible for the rail carriers to establish and maintain a basis of rates that will give their all-rail routes an equality of opportunity with the water routes of appellant and will enable the rail carriers to obtain, to use the phrase that the Commission has (*American Hawaiian S. S. Co. v. Erie Railroad Co.*, 152 I. C. C. 703, pp. 710-711) a "reasonable share of the traffic herein involved." Appellant has never contended that a division of the sugar tonnage out of New Orleans, under which it and other barge lines obtained 90 per cent of the traffic and the rail carriers 10 per cent, gave the rail carriers a "reasonable share" of the sugar traffic.

Appellant says (p. 62) that it does not contend that it should be given a preference in rates over a common carrier by rail, that it is here contending for the right to continue in existence as a transportation agency and contending that under the law the Commission has no power by its decisions to select rail lines as the sole transportation facilities in which to carry the commerce of the United States. The Commission has not by its decision in this case selected the rail lines as the sole facilities for the transportation of sugar. The Commission has recognized what appellant recognized, that there was an unfair relationship between the all-rail rates from New Orleans and the rates in connection with the water service, and has sought to correct that situation. The Commission has endeavored to establish a reasonable and fair relation between the rail rates and the rates in connection with this service by water, handicapped as the Commission is, in its efforts to arrive at this most desirable result, by the fact that it has no jurisdiction over the port-to-port rates of appellant and these other barge companies.

The Commission in a very recent decision involving the rates of the American Barge Line Company (*Application of the American Barge Line Co.*, 190 I. C. C. 177) said, p. 180:

> "The question of the amount of the differentials to be prescribed is difficult, and the petitions and replies throw little light upon it. Under the law the differentials must be such that the joint rail-water transportation to which they relate shall be upon terms reasonably fair to both rail and water carriers, not designed to divert traffic from one or the other but to reflect differences in cost and value of service. * * *"

Appellant overlooks the fact that Section 500 of the Transportation Act declares it to be the policy of Congress to foster and preserve in full vigor both rail and water transportation. Appellant treats this section as referring to water transportation only. The Commission in *Reduced Rates to the Pacific Coast*, 89 I. C. C. 512, after referring to Section 500, said (p. 538), that the policy of Congress in this respect could be effectuated only under rate adjustments which will permit of an equitable distribution of available traffic.

The Commission pointed out in the very first paragraph of its report that the rail carriers are in poor financial condition and need increased revenues (R. 22).

Clearly what the Commission sought to accomplish in this case was an adjustment of rates that would permit of a more equitable distribution of the sugar traffic from New Orleans between the rail carriers on the one hand and the barge lines on the other than had theretofore existed.

As the Commission has said, it does not fix the rates for the rail carriers and the rates for the barge lines and the differentials between those rates for the purpose of diverting traffic from one or the other. It fixes rates that are designed to reflect the differences in the cost and the value of the service (*Application of American Barge Line Co.*, 190 I. C. C. 177). The Commission does not hold that one carrier rather than another is entitled to the traffic on a particular commodity. It seeks, so far as it can under the conditions existing at the present time, and bearing in mind the fact that it has no control over the port-to-port rates of the barge companies, to establish rates that will enable the rail carriers and the water lines to compete on a fair and equitable basis with one another. It has the power to restrain competition on the part of the rail carriers when that competition leads to proposals on the part of the rail carriers to establish rates that are in violation of some provision of the Act. It can through the minimum rate power, as it did in the instant case, fix a rate below which the rail carriers may not go. The Commission said in *Luckenbach Steamship Co.* v. *Southern Railway Co.*, 157 I. C. C. 752 (p. 760) that the Commission

> "will not permit much less require, carriers subject to our jurisdiction to engage in unreasonable competition. This we take it was the purpose of Congress in conferring upon this Commission the minimum rate power."

It is the power of the Commission to fix minimum rates that affords a real protection in favor of these barge lines and against the proposals of the railroads, and enables the Commission to carry out the policy of Congress as expressed in Section 500.

We may well direct attention to what the Federal Coordinator of Transportation said in his report of March 10, 1934 (p. 73):

> "However, there is little warrant for a belief that the Commission has been unduly favorable to the railroads, as compared with water carriers. Certainly the railroads entertain no such thought. Their comments upon the administration of the Fourth Section and of the Inland Waterways Corporation Act are sufficient evidence of this fact."

There is no provision in the Interstate Commerce Act, as appellant seems to think there is, that requires rail carriers to maintain their rates on such a high level as to prevent traffic from moving by rail. Rail carriers have the right to compete for traffic just as the appellant has. They have the right to reduce their rates, provided only that the reduced rates are not in violation of the Interstate Commerce Act.

These barge lines, including appellant, operate on waterways that are maintained at the expense of the taxpayers. The taxes they pay are trivial in amount compared with the taxes the railroads pay. The wages and hours of their employes are not subject to regulation and control as are the wages and hours of the railroad employes. The experience of the past decade has made it very plain to the railroads that they do not enjoy any monopoly in traffic. But they do contend with all the earnestness in their power, that if they are to continue to provide an adequate system of transportation for the public as a whole, they are entitled to maintain rates that are not unreasonably low, that are not unduly preferential or unjustly discriminatory, that are not in violation of the Fourth Section except when authorized by the Commission, but that at the same time will give their all-rail routes an equality of opportunity with the water carriers, and will give the rail carriers a fair and reasonable opportunity to compete with the water carriers.

Appellant seems to treat the certificate of public convenience and necessity granted to it by the Commission (*Ex Parte No. 99, Application of Mississippi Valley Barge Line Co.*, 167 I. C. C. 41), as a sort of letter of marque under which it could prey upon the traffic of the railroads, but which would prevent the railroads from establishing rates that would enable them to meet on a fair and reasonable basis the competition of appellant. Of course appellant knew as a matter of law at the time it started operations that it would have to meet the competition of other agencies and means of transportation. It knew that railroad rates are not static, that they may be increased or reduced, provided always that they do not violate the Interstate Commerce Act. Neither the certificate of public convenience and necessity issued by the Commission to appellant nor Section 500 of the Transportation Act makes the operations of appellant immune from competition.

These interveners respectfully submit that the orders of the Commission in this case do not sanction a violation of the Transportation Act but that on the other hand the Commission's decision makes it clear that the Commission in considering the issues before it construed and applied the Interstate Commerce Act in the light of Section 500 of the Transportation Act.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION DOES NOT SANCTION A VIOLATION OF THE ANTI-TRUST LAWS.

Appellant states (p. 66) that the reductions in rates complained of by it were initiated through concerted action of the various executives of the southern lines who authorized their publishing agent to prepare and file sweeping reductions in the going sugar rates, and argues that clearly this concerted action comes within the prohibition of the anti-trust laws (15 U. S. C., Secs. 1 and 2), if it results in restraint of trade or monopoly.

Appellant argues (p. 78) that the statement of the Commission which shows that the Commission clearly admits that the rates found justified will restrain trade and commerce among the several States, is found in the following (R. 42-43):

> "The proposed rates, as applied to the interior points alone, would probably bring respondents heavy traffic, would stop a large part of the distribution of water-borne sugar and dry up much of the water movement."

And the further statement (R. 46):

> "Protestant urges that the respondents have conspired in restraint of trade and in violation of the

anti-trust law to monopolize the traffic. If respondents succeed the barge lines will be dealt a staggering blow."

The court's attention is first directed to the fact that the Commission found that the proposed rates based upon a minimum weight of 80,000 pounds, the rates that really concerned appellant, had not been justified by the carriers, that they were lower than the necessities of the situation required, but found that the carriers had justified rates 4c higher, an increase of about 13 or 14 per cent. The respondent carriers did not succeed in convincing the Commission that the rates they proposed would be reasonable minimum rates. The Commission made no finding that the respondent carriers either under the proposed rates or those which the Commission found the carriers had justified would be able to monopolize the sugar traffic from New Orleans. The Commission's decision shows (R. 36) that the barge lines have enjoyed a practical monopoly of the movement of sugar from New Orleans, the movement by barge in 1932 from New Orleans amounting to over 500,000 tons, about ten times as much as moved by rail. What the Commission sought to do was to establish rates that would give the all-rail routes an equality of opportunity with the barge routes with respect to this traffic.

The Commission thus made no finding that the carriers in proposing the reduced rates had violated or would violate the anti-trust laws. The Commission indeed was not called upon and had no occasion to consider the question whether the carriers had violated the anti-trust laws. This was not the issue before the Commission. The Commission is not empowered to enforce the anti-trust laws. It passes upon the lawfulness of rates and determines their lawfulness by the standards laid down in the Interstate Commerce Act. As stated by this court in *Keogh* v. *C. & N. W. Ry. Co.* 260 U. S. 156 (p. 162):

> "A rate is not necessarily illegal because it is a result of a conspiracy to restrain trade in violation of the Anti-Trust Act. But rates are legally determined by the Act to Regulate Commerce."

We are utterly unable to understand what basis or justification there can be for this argument of appellant. This proceeding is not one to restrain an alleged violation of the anti-trust laws, or to recover damages for such violation, but is a proceeding against the United States under the District Court Jurisdiction Act (28 U. S. C., Secs. 43, 48), to set aside an order of the Commission. We do not see how this proceeding can be converted into a proceeding in which this court can find, without a scintilla of evidence before it, that the carriers that published the reduced rates on sugar from New Orleans to the North had violated the anti-trust laws or that the Commission itself has sanctioned such a violation.

The contention that the Commission should enforce the anti-trust laws is not a new one, although it has many times been urged upon the Commission itself. The Commission has always held that it is without authority to administer the anti-trust act, or even to determine whether it has been violated; that if its investigation showed that the anti-trust act had been violated, the Commission's power would not be enlarged or its duty changed with respect to the rates involved; and that the utmost it could do would be to lay the proofs before the Attorney General. (*Sprigg* v. *B. & O. R. R. Co.* 8 I. C. C. 443; *China Trading Co.* v. *Georgia R. R. Co.* 12 I. C. C. 236; *Warren Co.* v. *Southern Railway Co.* 12 I. C. C. 381.)

This court has recently had occasion to point out (*Central Transport Co.* v. *Terminal Railroad Company of St. Louis,* 288 U. S. 469, p. 473) that under the Sherman Anti-

Trust Act the government alone was authorized to maintain a suit to restrain violations of its provision (*Kane Lumber Co.* v. *Neal,* 244 U. S. 459), that private persons were first authorized to bring suit for that purpose by Paragraph 16 of the Clayton Act (U. S. C. Title 15, Sec. 26), but with this proviso: "that nothing herein contained shall be construed to entitle any person, firm or corporation or association except the United States to bring suit in equity for injunctive relief against any common carrier subject to the provisions" of the Interstate Commerce Act "in respect of any matters subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." This court held that the Central Transport Company had no right under the statute to bring suit against certain rail carriers having terminals in St. Louis, Missouri and East St. Louis, Illinois, to restrain an alleged violation of the Sherman Anti-Trust Act, on the ground that the acts complained of involved matters subject to the jurisdiction of the Commission.

Appellant argues (p. 73), that it does not seek a ruling that the carriers themselves who reduced the rates on sugar from New Orleans had violated the anti-trust laws, but, a ruling that the Commission, a federal agency, had rendered a decision which is "admittedly contrary to the Sherman Act." But the anti-trust laws are not directed against agencies or instrumentalities of the Government of the United States, but against a contract, combination, or conspiracy, in restraint of trade, and against persons who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States (15 U. S. C., Secs. 1 and 2). The substance, therefore, of what appellant seeks to obtain is the same as that which the Central Transport Company sought to obtain in the case just cited. And as stated by the District Court in its opinion (4 Fed. Supp. 745, p. 747, R. 97), the answer to this contention is obvious: only the United States can sue to enjoin, for an alleged violation of the anti-trust laws, a combination of common carriers subject to the provisions of the Interstate Commerce Act with respect to a matter within the jurisdiction of the Interstate Commerce Commission.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION DOES NOT SANCTION A VIOLATION OF SECTION 3.

Appellant argues (pp. 74-75) that the Commission's decision violates Section 3 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 3 (1)), which section prohibits undue preference or prejudice. Appellant refers (p. 74) to certain findings of the Commission which we shall later quote.

That the Commission, in passing upon the issues before it, considered whether the rates proposed by the rail carriers would violate Section 3 is shown by the discussion of the evidence respecting this issue in the decision itself (R. 47, 48, 49). The Commission said that if the proposed rates from New Orleans were approved, the rate from New Orleans to Terre Haute, Indiana, for instance, would be reduced from 56c to 30c, while to Paris, Illinois, a nearby point on an eastern line, a rate of 56c would remain. The Commission said (R. 47):

> "Appellant urges that no such disparities would be unduly prejudicial. No one who might be adversely affected appeared. Respondents would publish properly related rates to destinations on the lines of the Eastern carriers if they could get concurrences."

As pointed out by the Commission, Paris, Illinois, is a point on an eastern railroad which refused to join in the rates from New Orleans, the eastern railroads having filed protests against the rates proposed by the southern carriers from New Orleans based on a minimum of 80,000 pounds per car (R. 47). The rail carriers from New Orleans cannot under the law be charged with undue preference and prejudice in connection with rates beyond their control. (*Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, p. 649.)

The Commission also referred to the fact (R. 48) that rates to western points beyond destinations considered had not been specifically considered by the southern carriers, that certain disparities would therefore result from the establishment of the proposed rates, that the rate from New Orleans to Davenport, Iowa, would be reduced from 62c to 30c, but that from New Orleans to Des Moines, Iowa, for a similar haul, would remain at 65c. The Commission said respecting this disparity (R. 48):

> "The Mississippi Valley Barge Line makes a point of this fact, but no one who might be adversely affected is before us. In the time available it was impracticable for respondents to cover all the territory which might be affected by the competitive conditions. Respondents expect to deal with these situations on their merits after our decision herein."

Appellant in contending that this particular disparity would violate Section 3 overlooks the fact that Davenport is on the Mississippi River, that the rates to Davenport are affected by water competition, while Des Moines is an inland point not located on a navigable stream. It is well established that there can be no finding of undue preference and prejudice unless the circumstances and conditions are substantially the same. (*Interstate Commerce Commission* v. *B. & O. R. R. Co.* 43 Fed. 47, affirmed 145 U. S. 263; *T. & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197.)

Appellant asks this court to weigh the facts found by the Commission in its decision, and to determine the question of fact whether the rates found not unlawful by the Commission are in fact unlawful in violation of Section 3, although the evidence upon which the Commission acted is not before this court.

Appellant has overlooked the repeated holdings of this court that every rate which gives a preference or advantage to certain persons, commodities, localities or traffic is discriminatory, but that such discrimination is not necessarily unlawful, that the Interstate Commerce Act, by Sections 2 and 3, prohibits only that discrimination which is unreasonable, undue or unjust, that whether preference or discrimination is undue, unreasonable or unjust, is one of those questions of fact that has been confided by Congress to the judgment of the Interstate Commerce Commission. (*N. C. & St. L. Ry. Co.* v. *Tennessee*, 262 U. S. 318, p. 322; *T. & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, pp. 219-220; *Manufacturers' R. R. Co.* v. *United States*, 246 U. S. 457, p. 491; *Interstate Commerce Commission* v. *Alabama Mid. Ry. Co.* 168 U. S. 144, p. 170; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, p. 361; *Interstate Commerce Commission* v. *B. & O. R. R. Co.* 145 U. S. 263, pp. 276-277.)

Appellant asks this court to hold that as a matter of law a mere difference in rates results in a violation of Section 3. This is a contention that has been repeatedly pressed upon the Interstate Commerce Commission, which has uniformly held that violations of Section 3 are not established by a showing of a mere difference in rates. (*Indianapolis Freight Bureau* v. *C. C. C. & St. L. Ry. Co.* 23 I. C. C. 195, p. 207; *Loose-Wiles Biscuit Co.* v. *St. L. S. F. Ry. Co.* 136 I. C. C. 353, p. 355; *Astoria* v. *S. P. & S. Ry. Co.* 38 I. C. C. 16, p. 24; *Sunderland*

Brothers v. *C. B. & Q. R. R. Co.* 148 I. C. C. 484, p. 486; *Aluminum Co.* v. *A. T. & S. F. Ry. Co.* 146 I. C. C. 363, p. 372.) The Commission has also repeatedly held that a finding of unlawful discrimination cannot be predicated upon a mere assumption or assertion of its existence, that it may not be predicated upon general representations. (*Rathkamp Brothers* v. *N. & W. Ry. Co.* 179 I. C. C. 25, p. 28; *Kirby-Bonner Lumber Co.* v. *Director General,* 78 I. C. C. 333, p. 336; *Mississippi Railroad Commission* v. *A. & V. Ry. Co.* 89 I. C. C. 47, p. 72.)

Appellant contends (p. 76) that a court of equity cannot condone an apparent and admitted violation of the very act under which the Commission functions and that therefore the Commission's decision which admits of the situation necessarily violates existing law. Appellant overlooks that it is the Commission itself that is charged with the duty of determining whether there are violations of the Interstate Commerce Act, and that the Commission's findings when supported by the evidence are conclusive.

Appellant does not contend that the rates that have been published by these interveners from New Orleans are unjustly discriminatory against it or unduly prejudicial to it. Appellant is in no such position to make any such claim, for it does not forward or receive shipments of sugar, and pays no freight charges on such shipments. Its contention is hardly more than a mere suggestion that shippers, refiners and purchasers, who are not before this court, and who did not complain before the Commission, may file a complaint alleging a violation of Section 3. We may well say what this court said in *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.* 218 U. S. 88, that it will not listen to a party who complains of a grievance which is not his.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION DOES NOT SANCTION A VIOLATION OF SECTION 4 OF THE INTERSTATE COMMERCE ACT.

Appellant argues (p. 76) that the Commission's decision sanctions a direct violation of Section 4 (1) of the Interstate Commerce Act, familiarly known as the long-and-short-haul clause (49 U. S. C. Sec. 4 (1)).

The Commission's decision shows that it does not sanction a violation of Section 4, that in fact it made no finding that under the adjustment of sugar rates proposed by the carriers there would be a violation of Section 4. The carriers proposing the reduced rates from New Orleans did not seek relief from Section 4, and the Commission itself pointed out in its decision (R. 43) that the carriers explained that the proposed rates from the South to the water-competitive points were blanketed to the interior, not only because of the uncertainties and difficulties attending applications for Fourth Section relief, but because they considered it desirable from a commercial and economic point of view to keep interior dealers on a parity.

An affidavit submitted by appellant at the hearing before the District Court states that the rate fixed from New Orleans to Jonesboro, Arkansas, 486 miles, is 34c, that Jonesboro is intermediate between New Orleans and St. Louis via a direct route, and that the rate fixed by the Commission from New Orleans to St. Louis is 32c, that no Fourth Section relief was granted to the southern lines. (R. 134.)

Not all departures from the long-and-short-haul rule of Section 4 are unlawful. Under that section the Commission has the power to authorize carriers to charge less for a longer than for a shorter distance, and to prescribe the extent to which common carriers may be relieved from the operation of Section 4. (*Intermountain Rate Cases*, 234 U. S. 476, p. 485.) Interveners presented to the District Court an affidavit (R. 160) which states that the departure from Section 4 referred to by appellant is protected by Fourth Section Order No. 7542 of the Commission (R. 161). Appellant argues (p. 76) that this order does not protect this departure.

It is unnecessary, however, for this court to pass upon this dispute between appellant and the interveners as to the construction to be placed upon this order., If it is a fact that there are departures from Section 4 in the adjustment of sugar rates from New Orleans which have not been authorized by the Commission, it is the duty of the rail carriers to remove those departures. If appellant believes that there are Fourth Section departures in the adjustment that have not been authorized by the Commission, it would be entirely proper for appellant to direct the Commission's attention to those departures, that the Commission may consider whether they have been authorized by the Commission, and if not, that the Commission may call upon the carriers to remove the departures. This is not a question however that affects the appellant in any way, or a question which gives it any right to complain in such a proceeding as the present one.

THE DENIAL BY THE COMMISSION OF APPELLANT'S MOTION FOR A REHEARING WAS NOT A DENIAL OF A RIGHT GUARANTEED BY LAW.

Appellant argues (p. 77) that the denial by the Commission of appellant's motion for a rehearing (R. 143) was a denial of a right guaranteed by law. Appellant states that the motion alleged changed conditions "that had resulted during the period from the hearing of said record up to the release of the Commission's decision on July 17, 1933." This concession brings this contention within the principle recently announced by this court in *United States* v. *Northern Pac. R. Co.* 288 U. S. 490 (pp. 493, 494), to which we shall later refer.

Appellant cites in support of its contention the case of *A. T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, familiarly known as the Western Grain Rate Case. The court in this case set aside an order of the Commission reducing grain rates in the Western District, on the ground that refusal of the Commission to reopen proceedings, in which the Commission had fixed the rates, was an abuse of discretion.

It will be recalled that the record in the Western Grain Rate Case before the Commission was closed in September, 1928; that the matter was submitted to the Commission on argument on July 1, 1929, and that the Commission made its report and entered its order on July 1, 1930, fixing the rates to be charged on and after October 1, 1930. In September, 1930, the carriers requested a rehearing. Prior to action thereon the railroads had brought to the Commission's attention their changed financial condition due to the economic depression. In November, 1930, a rehearing was denied. On February 19, 1931 a second petition for rehearing was presented which averred that due to the nation-wide depression which began in November, 1929, the facts exhibited by the record that was closed in September, 1928, were utterly unrepresentative of conditions existing at the effective date of the order some two and one-half years later.

Here the situation is entirely different. The southern carriers proposed that the reduced rates from New Orleans take effect on October 1, 1932 (R. 1). The appellant and other parties filed a protest against these rates on September 8, 1932, (R. 2) following which the Commission, acting under the authority vested in it by

Section 15 (7) of the Interstate Commerce Act, (49 U. S. C., Sec. 15 (7), suspended the rates and entered upon an investigation concerning their lawfulness. A hearing was held on October 25-November 3, 1932, and the proceeding submitted to the Commission on March 2, 1933 (R. 19). The Commission's report and order were handed down on July 3, 1933 (R. 19). Obviously no such situation is here presented as was presented in the Western Grain Rate Case.

And if the situation had changed it was incumbent upon appellant under the recent decision in *United States v. Northern Pac. Co.* 288 U. S. 490, to bring at once the alleged changes in conditions to the Commission's attention without waiting for the Commission's decision. But appellant took the chance of a favorable decision and waited until the Commission had handed down its decision in this case before filing on or about July 25, 1933 (R. 142) its motion for a rehearing. Appellant has never contended that the alleged changes in conditions arose only after the date of the Commission's decision (July 3, 1933, R. 19).

In the *Northern Pacific Case, supra,* the District Court had set aside the order of the Commission on the ground that the Commission had abused its discretion in refusing to reopen the case and to receive proof of changes in economic conditions arising after the close of the evidence. But this court upheld the validity of the Commission's order and said (p. 494):

> "Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complaint of the refusal of their petition. They set silent and took the chance of a favorable decision on the record as made. They should not be permitted

> to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order."

Wholly aside from the point we have just considered, appellant's motion for a rehearing shows on its face that the Commission was amply justified in denying it. The changed conditions which appellant contended had taken place are thus summarized by appellant in its brief (p. 77): (1) depression, (2) National Industrial Recovery Act, (3) competition, (4) regulation, and (5) clarification of the record.

The motion for a rehearing shows (R. 144-145) that while there had been during the summer of 1933 some improvement in business conditions, the improvement had not been great enough to justify the conclusion that the railroads could remain indifferent to the ever-increasing losses in their traffic to their competitors. The total car loadings for the week prior to July 15, 1933 were 106,000 per day as compared with 82,000 for the previous year. But the daily average of car loadings for the five-year period 1928 to 1932 was 144,000 (R. 145). Neither these figures nor the others set out in the motion (R. 145) would have justified the Commission in reopening a case that it had decided as late as July 3, 1933, and which was heard by the Commision as late as the preceding fall.

The National Industrial Recovery Act (Act of June 16, 1933), was passed after the hearing in this case was closed. Appellant contended in its motion (R. 145) that this enactment was intended to and will apply to the essential matters involved in this case, that it provides a means of controlling unfair competition, and would correct the lack of stabilization in the rates on sugar by the water lines which appellant itself conceded in its motion (R. 146). But this court can take judicial notice of the fact that up to the present time only one code of fair competition for water carriers has been approved, a code dealing with water carriers operating via the Erie Canal (Code of Fair Competition, approved February 6, 1934). No one can say at this time to what extent the approval of codes for water lines will stabilize rates and will eliminate the unfair competition that is now characteristic of the port-to-port rates of these various water lines whose port-to-port rates are subject to no control or regulation whatever. The recent report of the Federal Coordinator of Transportation (report of March 10, 1934), gives emphasis to the utterly chaotic conditions that now exist with respect to the port-to-port rates of the water carriers operating on the inland waterways and along the coasts of the United States, and makes it clear that stabilization in rates can be secured only through regulation in some such manner as the railroads are now regulated.

Appellant contended in its motion for a rehearing (R. 147) that the conditions disclosed by the record in this case have been changed by the withdrawal of the so-called "contract" barge lines from operation between New Orleans and St. Louis. But as shown by the Commission's decision, the contract barge operations were only one of the many considerations dealt with by the Commission in its decision. Appellant did not contend in its motion that there had been any change with respect to the contract barges operating by water routes from New York to Chicago, a matter dealt with at length by the Commission in its report (R. 23, 26). And the Commission itself refers (R. 44) to the fears of the rail carriers that if the tendency on the part of the sugar refiners at New Orleans to ship by contract barges was not stopped, all the refiners, to protect themselves, would use contract barges or provide their own barges for most of the traffic, that petroleum, steel, and cotton interests have already entered the river transportation business to a greater or less extent.

The Commission found (R. 44) and we emphasize this finding:

> "* * * One of the main purposes of the proposal is, therefore, to discourage the refiners in providing their own means of transportation or patronizing (fol. 51) operators of contract barges. The mere publication of the proposed rates has already deterred one refiner from increasing its river terminal facilities."

These are only some of the many facts that the Commission had before it in this case. The Commission was not obliged to base its decision upon one fact alone in the record before it, but was on the other hand obliged to consider and weigh all the facts. And in passing upon appellant's motion for a rehearing it was its duty to consider all the facts that the Commission had before it, and all the considerations to which it gave weight, and then to determine whether appellant's motion should be granted or denied. The affidavit, moreover, offered in the District Court on behalf of these intervening rail lines conclusively shows that contract barge operation on the Mississippi River had not disappeared (R. 156, 160).

Appellant contended in its motion (R. 148) that the water lines have been active in advocating regulation of water transportation by the Commission or some regulatory body, and confidently expected the passage of such an enactment at the next session of Congress, that it therefore seemed unwise and inopportune on the part of the Commission to embroil these competitive carriers in warfare if regulation can and is to be secured in the immediate future.

This Court can take judicial notice of the fact that Congress has up to the present time passed no law dealing with the regulation of these barge lines on the inland waterways.

And lastly appellant contends that its motion for a rehearing should have been granted in order that the Commission might clarify the record (R. 148). This is simply an appeal that the Commission reconsider what it had theretofore reconsidered. It will be borne in mind that the decision in this case was by the entire Commission (R. 21).

The District Court was right in its conclusion that appellant's contention was sufficiently answered by the decision of this Court in the *Northern Pacific Case*, 288 U. S. 490 (p. 494):

> "The decision in the *Santa Fe Case* (284 U. S. 248) is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier's revenue. The rule announced while intended to safeguard substantial rights of the railroads may not be invoked where its application would disenable the Commission to protect the interests of the public."

CONCLUSION.

These interveners respectfully submit that the findings and order of the Commission in this case do not subject or threaten appellant to any legal wrong and that appellant therefore did not have the legal right to institute an independent suit to set aside the Commission's order; that inasmuch as the order did not require the carriers to establish any rates whatsoever, and as the rates now in effect were established by the carriers as a result of their voluntary action and not pursuant to any order of the Commission requiring their establishment, and may not be changed except after a hearing before the Commission, the case presented by appellant has become moot; that the findings and order of the Commission are, furthermore, negative in substance and may not be judicially reviewed in any court.

These interveners further submit that the findings and order of the Commission in this case do not sanction a violation of Section 500 of the Transportation Act of 1920; that the Commission in passing upon the issues construed and applied the Interstate Commerce Act in the light of the declaration of policy contained in Section 500; that the rates that the Commission found the carriers had justified are reasonable and compensatory; that the findings and order do not sanction a violation of Sections 3 and 4 of the Interstate Commerce Act; and that the denial by the Commission of appellant's motion for a rehearing was not a denial of right.

The decree of the court below was right and should be affirmed.

Respectfully submitted,

WILLIAM A. NORTHCUTT,
HORACE L. WALKER,
ELMER A. SMITH,
Attorneys for Interveners.

March 31, 1934.

APPENDIX.

Section 1, Paragraph 5 of the Interstate Commerce Act (49 U. S. C., Sec. 1, (5)) provides in part:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *"

Section 3, Paragraph 1 of the Interstate Commerce Act (49 U. S. C., Sec. 3 (1)), reads as follows:

> "(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 4, Paragraph (1) of the Interstate Commerce Act (49 U. S. C. Sec. 4 (1)), reads as follows:

> "Sec. 4. Long and short haul charges; competition with water routes.—(1) *Charges for long and short hauls and on through route.* It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter, but this shall

not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That rates, fares, or charges existing on February 28, 1920, by virtue of orders of the commission or as to which application had theretofore been filed with the commission and not, as of that date, acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the commission."

Section 13, Paragraph (1) of the Interstate Commerce Act (49 U. S. C. Sec. 13 (1)), reads as follows:

"Sec. 13 (*As amended June* 18, 1910, *and February* 28, 1920.) (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of any-

> thing done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 15, Paragraph 1 of the Interstate Commerce Act (49 U. S. C., Sec. 15 (1)), reads as follows:

> "That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever, of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be

the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15, Paragraph 7 of the Interstate Commerce Act (49 U. S. C., Sec. 15 (7)), provides in part that:

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; * * *"

SUPREME COURT OF THE UNITED STATES.

No. 807.—October Term, 1933.

The Mississippi Valley Barge Line Company, Appellant, *vs.* The United States of America, Interstate Commerce Commission, Illinois Central Railroad Company, et al., Appellees.	Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division.

[April 30, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

The appellant, Mississippi Valley Barge Line Company, is a common carrier by water, operating towboats and barges on the Mississippi and Ohio Rivers. It derives a large part of its earnings from the transportation of sugar, which it carries from New Orleans to Cincinnati and St. Louis and intermediate ports. It is in active competition with rail carriers serving the same ports and inland points beyond.

In 1932, the Illinois Central Railroad Company and other carriers by rail filed with the Interstate Commerce Commission proposed schedules of reduced rates on sugar from New Orleans to northern points, the rates to become effective October 1 of that year. The aim of the reduction was to meet the competition of the appellant and other carriers by water who had been able by reason of low and unregulated rates to divert to themselves a large part of the traffic in sugar that till then had moved by rail. The railway companies perceived that they were threatened with still heavier losses in the future unless something was done by a reduction of their own charges to recover the business that was slipping from their grasp. Indeed the change had gone so far that already they were hauling practically no sugar within the field of competition. In 1932 the barge movement amounted to over 500,000 tons, about ten times as much as moved all-rail from Louisiana to the north. Of the water borne traffic, by far the greater part was carried by the Federal Barge Line, which has acquiesced in the new schedules, preferring to let the rail carriers fix the rate level. The residue has been carried, part of it by this appellant, part by the American Barge Company, and part by tramp or contract operators. During the year 1932, one railway company, the Illinois Central, lost about half a million dollars by traffic thus diverted. The new schedules that were filed in the attempt to retrieve these losses proposed two different sets of rates, one based upon a minimum weight of 60,000 pounds per car, and the other upon a minimum weight of 80,000 pounds per car. To illustrate their effect, the old rate between New Orleans and Chicago had been 56¢ per 100 lbs.; the new one was 30¢ per 100 lbs. for the 80,000 minimum and 39¢ per 100 lbs. for the 60,000 minimum. Between New Orleans and St. Louis the old rate of 52¢ became 28¢ and 34¢.

Protests against these changes having been filed by the appellant and others, the Interstate Commerce Commission proceeded to an investigation under section 15 (7) of the Interstate Commerce Act, and in the meantime ordered that the schedules be suspended. There were full hearings of the parties in interest, with testimony and argument. On July 3, 1933, the Commission found by its report that the respondents (the interveners in the court below) had justified the proposed rates with the 60,000 pound minimum. It found that they had not justified the proposed rates with the 80,000 pound minimum, but that they had justified rates four cents higher. "So far as the 80,000 pound minimum is concerned," the Commission said, "this means all-rail rates from New Orleans of 34 cents to Chicago and 32 cents to St. Louis." *Sugar Cases of 1933,* 195 I. C. C. 127. The rail carriers accepted this proposal, and an amended order of the Commission gave approval to the schedules so revised.

Under the Urgent Deficiencies Act (October 22, 1913, c. 32; 38 Stat. 208, 220; 28 U. S. C. §§ 47, 48), the Mississippi Valley Barge Line Company filed a bill to enjoin and set aside the order of the Commission, joining the United States and the Commission as defendants. A number of rail carriers who had been respondents in the proceeding were allowed to intervene. After the filing of answers, the suit was heard by a District Court of three judges in accordance with the statute. 28 U. S. C. § 47. None of the evidence received by the Commission was placed before the court. All that the court had, aside from the report and orders, was a group of affidavits by the complainant's officers, which were in substance to the effect that the water carriers would be unable to compete with the carriers by rail if the schedules were to stand approved. These affidavits were received without objection as to their form, but subject to the objection that they were inadmissible in so far as they were inconsistent with what had been found in the report. The court dismissed the bill, holding that the findings of the report were conclusive as to the facts, and that they were sufficient on their face to uphold the lowered rates. 4 F. Supp. 745. An appeal to this court followed. Judicial Code, § 210; 28 U. S. C. § 47a.

The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. *Spiller* v. *A., T. & S. F. R. Co.*, 253 U. S. 117, 125; *Louisiana & Pine Bluff R. Co.* v. *United States*, 257 U. S. 114, 116; *Nashville C. & St. L. R. Co.* v. *Tennessee*, 262 U. S. 318, 324; *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 148; *C. I. & L. R. Co.* v. *United States*, 270 U. S. 287, 295. The appellant did not free itself of this restriction by submitting additional evidence in the form of affidavits by its officers. For all that we can know, the evidence received by the Commission overbore these affidavits or stripped them of significance. The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion. Quite manifestly they do. The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. *Florida* v. *United States*, April 2, 1934, — U. S. —. It is not the province of a court to absorb this function to itself. *I. C. C.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 100; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Virginian R. Co.* v. *United States*, 272 U. ~~S. 658~~, 663. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the face of its report. The rates were not approved as the respondents had submitted them. For the 80,000 pound minimum, they were found to be too low. Not till there had been an increase of four cents per 100 pounds did the schedule win approval. There was a sedulous endeavor to guard against a rate war that would end in mere oppression.

We are told for the appellant that upon the face of the report the Commission has been heedless of the mandate of a statute. By section 500 of Transportation Act, 1920 (Feb. 28, 1920, c. 91; 41 Stat. 499; 49 U. S. C. § 142) "it is declared to be the policy of Congress to promote, encourage and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." Following this declaration, which is in the last title of the act, a duty is imposed upon the Secretary of War to do certain acts with the object of developing facilities for inland waterway transportation, and in particular to investigate the subject of water terminals both for inland waterway traffic and for through traffic by water and rail; to advise and coöperate with communities, cities and towns; and to ascertain whether the inland waterways "are being utilized to the extent of their capacity" and are meeting the demands of traffic. By earlier sections of the act (sec. 418; 49 U. S. C. § 15; 15[1]; 15[4]), the regulatory powers of the Commission had been broadened in respect of through or joint rates for carriers by rail and water, *Chicago, R. I. & P. R. Co.* v. *United States,* 274 U. S. 29, 36; and by the Inland Waterways Transportation Act as amended in 1928, these powers had a new extension. Act of May 29, 1928, c. 891, § 2; 45 Stat. 978; 49 U. S. C. § 153 (e); *United States* v. *Illinois Central R. Co.,* March 5, 1934, — U. S. —.

For the determination of this case there is no need to go into the question whether the declaration of the policy of Congress to foster rail and water transportation creates a new standard of duty for the Commission in the ordering of rates, or is a source of private rights if the duty is ignored. That question does not become important until the policy of the lawmakers appears to have been flouted; and here it was obeyed. The admonition does not mean that carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water. The most that it can mean, unless, conceivably, in circumstances of wanton or malicious injury, is that where carriers by land and water are brought within the range of the regulatory powers of the Commission, as e. g., in establishing through routes or joint rates, there shall be impartial recognition and promotion of the interests of all.

No discrimination of that kind is proved or even charged. The rates affected by this schedule do not involve the division of joint earnings between land and water carriers. The appellant makes its own rates from port to port, and may increase or lower them at will. What has been done by the Commission affects the carriers by rail alone, at least in its immediate consequences. Transportation by water may feel the repercussions of regulation elsewhere. It has not been regulated directly. Even for transportation by land, the Commission has done no more than establish a permissive minimum, and this a minimum sufficient to give assurance that the carriage of the sugar will not involve a loss. "There is no reasonable doubt," we are told in the report, "that the proposed rates are high enough to pay more than the cost of service."

The appellant insists that it is fighting for its life, and that the effect of the new competition will be to drive it out of business. Nothing in the findings gives substance to the fear. There is significance in the fact that the Federal Barge Line, the leading carrier by water, submitted without protest. We do not overlook a sentence that the appellant has lifted from its setting and put before us as a finding. "If respondents succeed, the barge lines will be dealt a staggering blow." Taken by themselves the words suggest a finding that the new schedules will affect the barge lines to the point of destruction, or something very near it. Read in the light of the context, they are not a finding at all, but a summary of the grounds of protest, an outline of the pleadings, or of what amounts to the pleadings before an administrative body. This being so, we do not now consider whether the destruction of a rival through the mere force of competition is legally a wrong, unless "disinterested malevolence" (*American Bank & Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350, 358), or something akin thereto, has supplied the motive power. *M. Steinert & Sons Co.* v. *Tagen,* 207 Mass. 394, 397; *Nann* v. *Raimist,* 255 N. Y. 307, 319.

There is no substance to the contention that the effect of the report is to give the sanction of the Commission to an illegal combination in restraint of trade and commerce.

Nor is there substance to the contention that discretion was abused by denying a rehearing. *United States* v. *Northern Pacific R. Co.,* 288 U. S. 490, 494.

For the purposes of this appeal we have assumed, as it was assumed in the court below, that the appellant has a standing sufficient to maintain the suit. See, however, *Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249. We have made a like assumption in answer to the argument of counsel for the railways that the order of the Commission is negative in form and substance, and hence not subject to review. *Alton R. Co.* v. *United States*, 287 U. S. 229. These objections to the suit coalesce to such an extent with the merits of the appellant's grievance under section 500 of the statute (Transportation Act, 1920) as to make it unnecessary to separate them.

The decree is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.